Petition

81-301

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ILLINOIS HEALTH SERVICE, INC.,
d/b/a BARCLAY HOSPITAL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES UNION LOCAL NO. 743, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether a purchaser of a unionized hospital should be found to be a successor employer with an obligation to collectively bargain when this finding is based upon factors whose presence was unavoidable in the health care industry due to the purchaser's concern for continuity of patient care and because of the stringent requirements of governmental regulations.

Whether the decisions below of the National Labor Relations Board and the Court of Appeals reflect an appropriate recognition of Congressional policy which mandates that special weight be accorded to the unique concerns of hospitals and the continuity of patient care in cases arising under the National Labor Relations Act.

Whether the decisions below of the National Labor Relations Board and the Court of Appeals reflect an appropriate recognition of the special obligations imposed upon employers in pervasively regulated industries, such as the health care field, which prohibit the application to them, without modification, of principles created for unregulated industries.

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NATIONAL LABOR RELATIONS BOARD,

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WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES UNION LOCAL NO. 743, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Illinois Health Service, Inc., d/b/a Barclay Hospital, prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Seventh Circuit enforcing an order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported. However, the opinion is set out in Appendix A to this Petition.

The decision and order of the National Labor Relations Board (Labor Board, herein) in the unfair labor practice proceeding is reported at 247 NLRB No. 144. It is set forth in Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on May 7, 1981. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTE INVOLVED

The statutory provisions involved are § 8(a)5 and § 8(d) of the National Labor Relations Act, (Labor Act, herein) as amended, 29 U. S. C. § 158, set forth in pertinent part in Appendix C to this Petition.

STATEMENT OF THE CASE

In this case an employer who purchased a unionized hospital was found to be a successor employer with an obligation to collectively bargain, because at the time of takeover he followed a course of conduct which was dictated by the requirements of governmental regulations and by his own concern for continuity of patient care.

In late 1977, London Memorial Hospital was advised by the State of Illinois that the facility's Medicade funding would be discontinued on December 31, 1977 (Stipulation at Transcript (Tr.) 21). Since it could not treat its major patient source, public aid patients, without this funding, London decided to sell the facility (General Counsel's (G. C.) Exh. 12). Charter Medical Corporation decided to purchase the facility because it would be afforded the opportunity there to introduce new and pilot treatment programs to a new patient source, privately funded patients (Tr. 130-131). The sale was consummated on January 6, 1978 and Charter took over operations on March 24, 1978 (Respondent (R.) Exh. 8).

Even before it began operating the facility, Charter had decided to introduce as quickly as possible two innovative therapeutic programs, an adolescent treatment program, headed by a nationally known psychiatrist who was not associated with London, and a psychoanalytic unit. The psychoanalytic unit was, at the time, used at only two other facilities in the United States, one in the northeast, the other near Washington, D. C. This unit, like the adolescent program, was to be headed by psychiatrists with national reputations, who were not associated with London (Tr. 134, 136, 191-2, 194-5, 315-18, 320-25, 328-33, 395, R. Exh. 4, 15). To administer these programs, Charter had also decided to phase out the large number of mental health associates employed by London and to replace them with more qualified employees (R. Exh. 2a, 2b).[1] Charter

[1] The mental health associates were included in the unit which voted in the November 30, 1977 election.

also embarked upon an extensive program of physician recruitment, not attempted by London (Tr. 189, R. Exh. 4, 28).

While Charter was, therefore, committed to make significant program and staff changes, it could not implement these plans at the time it assumed the operations of the facility.[2] Two factors, the requirements of governmental regulations and the necessary preoccupation to care for London's former patients, required it to begin its operations by providing essentially the same patient services as did London, using London's former employees.

To operate a hospital in Illinois, Barclay was required to obtain a license issued by the State Department of Public Health.[3] In order to secure this license, which was not transferable from London, Barclay had to demonstrate to the State that its staff was well qualified and that it would provide the same services as did London (Ch. 111½, §§ 147, 151.1, Tr. 420-21, Joint Exh. 9a-9f). In addition to obtaining a State operating license, Barclay had to quickly secure accreditation from the Joint Commission on Accreditation of Hospitals (JCAH) before it could receive health insurance payments for patient treatment and qualify for the federal Medicare program (Tr. 84-85; 143-145, 185-188).[4] The Joint Commission will investigate and confer accreditation only upon stable, on-going treatment programs (Tr. 408-410).

Had Barclay begun to implement the planned program and staff changes at the time it began operation of the hospital,

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[2] Each of the programmatic changes was implemented during late summer and fall of the year. (Tr. 139, 146-47, 175-76, 187-88, 191-92, 219-20, 314-15, 318-20, 374, 426-27)

[3] Hospital Licensing Act, Ill. Rev. Stat. Ch. 111½, §§ 142-157; Medical Practice Act, Ill. Rev. Stat. Ch. 91, especially §§ 1-11; Mental Health Code, Ill. Rev. Stat. Ch. 91½ especially §§ 1-5, 1-11, 1-12, set out in Appendix C to the Petition.

[4] Social Security Act of 1935, as amended, 42 U. S. C. §§ 1395x(f), 1395bb, set out in Appendix C to the Petition.

it ran a risk that the operating license and accreditation would be denied or seriously delayed. That is, any investigation by the State or Joint Commission while the changes were being introduced would likely reveal that the new treatment programs were still in a developmental stage, that the staff was in the process of being hired, and that Barclay was not, therefore, providing the same services as did London with a well qualified staff and stable on-going therapeutic programs.

Thus, in order to be certain it would secure a state license and prompt accreditation, Barclay initially retained London's staff and maintained its services, since the staff and services had been previously adjudged satisfactory by the State and Joint Commission (Tr. 408-410, R. Exh. 107a-l)[5].

Moreover, the compelling concern to provide continuous patient care and for patient well-being required Barclay to continue to treat the former London patients without any break in treatment using the staff which had worked for London. The importance of providing patients, particularly those in mental health care facilities, with a relaxed atmosphere and with continuity of patient care cannot be gainsaid. It is axiomatic that continuity of services and staff is essential to maintain this atmosphere and this type of care.

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[5] At the same time, Barclay requested and received an expedited accreditation examination, which resulted in earlier accreditation and permitted Barclay to begin to implement its planned operational changes. Barclay could not risk introducing the adolescent treatment program before accreditation, because without accreditation there was no assurance that private insurers of the adolescent patients would pay for treatment. The expedited examination, which occurred July 14, 1978, resulted on that date in oral assurance that accreditation was likely and in an official accreditation notice on September 15, 1978 (Tr. 143-45, 148, 153, 173-74, 181, 185-188, 287-89, 403-411, R. Exh. 107(a)-(l)). (Representative documents from R. Exh. 107 are set out in Appendix D to the Petition). However, when the Union's demand upon Barclay to commence negotiations was received on July 29, 1978, two weeks after the accreditation examination, Barclay had not yet had the opportunity to implement its planned operational changes.

In finding Barclay to be a successor to London and obligated to bargain with the Union, the court below and the Labor Board overlooked the context of and rationale underlying Charter's actions. Rather, the court and the Board focused only upon the fact that Barclay began operations by treating London's former patients without interruption in treatment, by using former London employees to provide this treatment, and by furnishing the same services as did London (Appendix A, pp. 4a-6a; Appendix B, pp. 28a-30a). Neither the court nor the Board even considered that Barclay had no rational or practical choice except to act as it did.

A purchaser of a factory, mine or retail enterprise does not face a similar lack of choice. The buyer of an assembly plant or restaurant has a *choice* of whether or not to retain the seller's employees, to continue to offer the same product or to produce it by the same methods. Therefore, these factors are correctly utilized on the industrial scene by courts and the Board to determine whether successorship exists. *Howard Johnson Company, Inc.* v. *Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO*, 417 U. S. 249 at 262 (1974). To focus upon these same factors in the health care field where their presence is not avoidable is not correct and demonstrates that the court below has failed to consider the special needs of hospitals and the heavy regulations imposed upon them.

Both this Court and Congress have directed the Labor Board and the courts, as well, to give careful attention to the unique needs and considerations of hospitals and with patient well-being, when resolving issues arising under the Labor Act in the health care field. The Petitioner has sought *certiorari* to review the ruling below because the decision of the court and the Labor Board have contravened this directive.

REASONS FOR GRANTING THE WRIT

1. The Court Below and the Labor Board Have Ignored Congressional Policy to Accord Special Weight to Unique Hospital Needs and Patient Well-Being When Resolving the Successorship Question Under the Labor Act

Where, as here, the court below and the Labor Board have failed to defer to Congressional policy and instead have decided a case in a manner that contravenes this policy, this Court should grant the Petitioner's Writ. Whatever deference is owed to the Labor Board as an "expert tribunal", this deference "cannot be allowed to slip into a judicial *inertia* which results in the unauthorized assumption by an agency of major policy decisions made by Congress." *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 318 (1965). Congress and this Court have both enjoined the Board and the Courts of Appeals not to treat hospitals as they would treat factories or mines when resolving issues under the Labor Act. As this Court has stated in another context in *NLRB* v. *Baptist Hospital Inc.*, 442 U. S. 773, 790 (1979),

> "hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar. The Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is, in fact, jeopardized." (quoting from *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483, 508 (1978))

This Court has also observed that:

> "Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike are often under emotional strain and worry, where pleasing and comforting patients are the principle facets of the day's activity, and where the patient and his family—irrespective of

> whether that patient and that family are labor or management orientated—need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sickbed." *Beth Israel Hospital* v. *NLRB*, 437 U. S. at 509 (Blackmun, J., concurring) (1978).

Congress has, in fact, stressed the uniqueness of health care institutions when amending the scope of the Labor Act to cover hospitals. Congress determined that the special needs of these institutions required that the Labor Act be applied to them differently than it is applied in the industrial scene. Special weight was to be given to hospital needs and patient well-being when applying the Labor Act to labor disputes.

> "It is important to remember that hospitals are not factories or retail establishments, and patients are not raw materials or merchandise. Hospitals are for human beings and actions pursuant to [the Labor Act] must take this fact into account. 120 Cong. Rec. 12945, (daily ed. May 2, 1974) (remarks of Senator Taft on S. 3203, A Bill to Amend The National Labor Relations Act to Extend Coverage And Protection To Employees of Non-Profit Hospitals).

> The Senate Report stated:

> "Many of the witnesses before the Committee, including both employee and employer witnesses, stressed the uniqueness of health care institutions. There was a recognized concern for the need to avoid disruption of patient care whenever possible." S. Rep. No. 93-766, 93d Cong., 2d Sess. *reprinted in* [1974] U. S. CODE, CONG. & AD. NEWS, vol. 2, 3946, 3951.

While Congress was interested in preventing disruption in patient care that would result from actual strikes or picketing (S. Rep. No. 93-766 *supra*), this Court's decisions in cases involving health care institutions and the scope of their rules against employee solicitation demonstrate that Congress had broader interests as well. This Court's observations in those

cases establishes that Congress has clearly expressed a concern for avoiding disruptions in the hospital environment regardless of whether or not the issues under the Labor Act concern actual strikes or picketing. *NLRB* v. *Baptist Hospital, Inc.*, 442 U. S. at 789-90; *Beth Israel Hospital* v. *NLRB, supra*, 437 U. S. at 508-09. In addition, *see, Baylor University Medical Center* v. *NLRB*, 578 F. 2d 351 (D. C. Cir. 1978), *vacated in part and remanded*, 439 U. S. 9 (1978).

The application of this broad judicial and congressional concern for hospital and patient needs when deciding issues under the Labor Act is singularly appropriate when resolving the successorship question in the health care field. As this Court has observed, the successorship question arises in a myriad of factual circumstances and legal contexts. Therefore, it is analytically appropriate to emphasize the facts of each case and the context in which these facts arise when determining whether or not a purchaser is a successor for collective bargaining or other purposes. *Howard Johnson Co., Inc.* v. *Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO*, 417 U. S. at 256. Which particular facts are to be emphasized in a given case is logically dependent upon articulated congressional concerns, when Congress has spoken. Congress has spoken in the health care field and both it and this Court have directed the Board to frame its rules and to administer them with careful attention to the unique needs of hospitals and to the well-being of their patients. *NLRB* v. *Baptist Hospital, Inc.*, 442 U. S. at 790, Note 16.

Accordingly, with these priorities in mind, the Board and the courts must determine if the presence of factors, such as continuity of operations without a hiatus and the continued employment of the seller's employees, which would signal successorship in the industrial area, should do so in the health care field. Unlike the purchasers of factories or assembly plants who can decide whether or not to begin operations without a

hiatus following the purchase and who can decide whether or not to offer the same services and employ the same employees as did the seller, the presence of these factors when a hospital is purchased cannot be avoided because of the purchaser's necessary preoccupation with patient well-being; a preoccupation that is in full accord with the views of Congress and this Court.

It must be emphasized that every purchaser of an enterprise, including a purchaser of a hospital, has a legal right to structure his business, for reasons which are economically and administratively sound, so that he does not constitute a successor for collective bargaining purposes. It is not a matter of a purchaser escaping successorship or a bargaining obligation. If an employer legitimately and in good faith structures his newly purchased business in a fashion which results in a non-successorship, and he may legally do so, the bargaining obligation does not arise or exist. *Pacific Hide and Fur Depot, Inc.* v. *NLRB*, 553 F. 2d 609, 614 (9th Cir. 1977).

Where the presence of certain factors, relevant to a finding of successorship on the industrial scene, cannot be avoided by a hospital purchaser if he is to fulfill his duty to care for patients in the institution, and where a court, as did the court (and Board) below, relies upon these factors to find successorship, the court and the Board have failed to act in accord with Congressional directives, and give special consideration to hospital needs and continuity of patient care.[6] Indeed, in this case, far from giving special weight to the unique concerns of hospitals and the well-being of their patients, the court and the Board have utilized factors whose presence is unavoidable due to Barclay's concern for patient care to find that Barclay is a successor employer who must bargain with a union.

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[6] Congress has specifically recognized the Labor Board must administer the Labor Act with an awareness of the need for continuity of patient care. 120 Cong. Rec. 12936, (daily ed. May 2, 1974); S. Rep. No. 93-766, quoted *supra* at page 8.

If Barclay were to give priority to its lawful desire to avoid successorship and, thereby, permit its employees to decide whether they want a union in the voting booth, Barclay, under the reasoning of the court and the Labor Board, would have had to disrupt patient care by closing the purchased facility before beginning operations, turning London's former patients out of the facility, hiring a new staff to begin operations and, upon opening, providing different services than did London. To state what Barclay would have had to do, under the court's opinion below, to exercise its right to be a non-successor is to demonstrate the fallaciousness of the court's reasoning. A purchaser of a hospital should not be faced with an option which requires him either to act contrary to the well-being of his patients or to become a successor with a collective bargaining obligation. Had the court and the Labor Board considered the unique needs of hospitals and the well-being of their patients, these factors—the continuity of operations without a hiatus, the provision of the same services with the same staff—would not have been accorded weight when determining whether Barclay was London's successor.

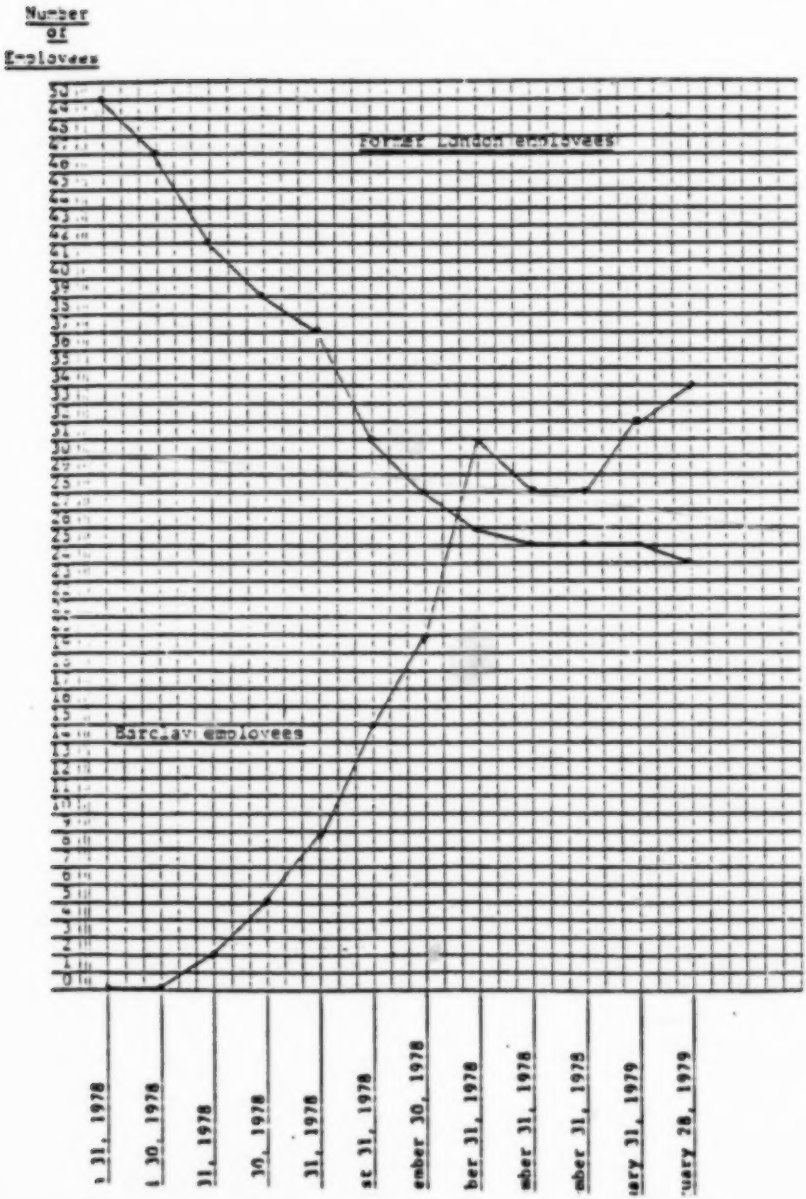
Rather, the court should have considered that Barclay, as quickly as possible, given its concern for continuity of patient care, as well as the requirements of governmental regulations (*see* Section 2, *infra*), implemented the programmatic changes it planned from the outset of its operations of the Hospital. Thus, the adolescent unit was operational by October, 1978.[7] The psychoanalytic program was also implemented as expeditiously as possible, given the complexity of this novel treatment plan. The first patient was received in August. Full implementation of this unit began when the adolescent unit was fully operational and the patient census had reached a point

[7] The adolescent unit would have been operational even earlier but for an unforeseen aluminum shortage which delayed delivery of aluminum protective window screens. These custom made screens cost $40,000 and were necessary to prevent adolescents from escaping the unit. (Tr. 146-47)

where funding was available for the psychoanalytic unit. It is important to note that at no time did Charter deviate from its plan to introduce new programs at Barclay and secure patients from a source untapped by London.

To bring about these new programs, Barclay spent over $550,000 in facility renovation and other necessary changes. Moreover, to administer these programs Barclay hired highly qualified staff who were not employed by London and retrained former London employees who were retained. (Tr. 216-229, 231-232, 234-236, 287-289). Many of the former London employees performed new roles as Barclay's therapeutic programs became operational. (Tr. 226-227). When, in November, 1978, the planned programmatic changes were underway, new employees hired into the bargaining unit exceeded those in the unit who were retained from London. The following graph illustrates the fact that former London employees did not constitute a majority in the bargaining unit when Barclay's programs became implemented.

RESPONDENT'S EXHIBIT #1
BARCLAY HOSPITAL AND FORMER LONDON EMPLOYEES
EMPLOYMENT PATTERNS
March 31, 1978 through February 28, 1979



It was not until late October or early November of 1978 that the programs became fully operational, and consequently, it was not until this time that a substantially full complement of new employees had been hired. (See graph, *supra*) Under this Court's own rule, as enunciated in *NLRB* v. *Burns International Security Services, Inc.*, 406 U. S. 272 (1972), in order to determine whether a true successorship situation exists and thus, whether a duty to bargain arises, the factual situation must be examined at the time that the purchaser has hired a full complement of employees in the appropriate bargaining unit. Thus, in the instant case, a successorship obligation never arose because at the critical date, November of 1978, the former London employees did not constitute a majority of the bargaining unit.

Since Barclay at no time swerved from its plan to institute unique programs in the Hospital, and since these programs were implemented as quickly as possible given the exceptional problems associated with operating in a regulated industry, and because former London employees did not constitute a majority in the bargaining unit when the programs were underway, the court should have held that Barclay was *not* London's successor. Had the court not focused upon factors whose presence was unavoidable, e.g., the necessary continuity of patient services, it likely would have so held.

2. The Court Below and the Labor Board Have Ignored the Obligations Imposed on Employers in Pervasively Regulated Fields When Resolving the Successorship Question Under the Labor Act

As shown, the factors relied upon by the court to find Barclay a successor—e.g., the continuity of the facility's operations, the care for London's former patients, and the continuity of staff—are required to be present when a hospital is purchased due to the purchaser's necessary and congressionally approved overriding concern for patient care. These same

factors are also present due to the pervasive regulation in the health care field.[8] If these factors were present due to the purchaser's choice, as they would be in a factory, mine or assembly plant, these factors would be indicative of successorship and justify the imposition of a bargaining obligation upon the purchaser. However, where, as here, these factors are present because the requirements of governmental regulations deprive purchasers of any choice to eliminate them, these factors should not be utilized to find that a buyer is a successor who has a bargaining obligation.

If factors whose presence is unavoidable at the time of purchase and for a period of time thereafter, due to the dictates of governmental regulations, are utilized to find successorship, purchasers in heavily regulated fields, such as health care, who have an equal right with other employers to be a non-successor, will be placed at a disadvantage when attempting to exercise this right. This is precisely what has occurred here. The court below and the Board, ignoring the stringent requirements of the State's regulations, have used the factors discussed above, whose existence at the time of purchase could not be avoided, to find successorship.

Thus, Barclay, unlike a purchaser of a factory or a mine, had to demonstrate to the State that it is able to provide a high standard of hospital service in accord with State requirements in order to obtain a license to open for patient care. Indeed, to obtain this State license, Barclay was required to assure the State that upon takeover it would continue the same services as

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[8] *See, Holmes* v. *Silver Cross Hospital of Joliet, IL*, 340 F. Supp. 125 (N. D. Ill. 1972), where the court noted particularly the degree to which hospitals are pervasively regulated by the state, citing, as examples of such regulation, the Hospital Licensing Act, Ill. Rev. Stat. Ch. 111½, § 142 *et seq.*, and the Civil Administrative Code, Ill. Rev. Stat. Ch. 127, especially § 55.26, set out in Appendix C to this Petition.

did London.[9] In addition, to secure a license Barclay had to be certain that its staff met State requirements.[10] In order to be certain that it would qualify for the State operating license, Barclay rationally decided to retain London's staff which had been approved by the State. Similarly, to be certain of acquiring this necessary license, Barclay reasonably decided to retain those suppliers who had satisfactorily provided services to London. Barclay had little, if any, choice except to make these decisions. To change suppliers or to hire new staff would have been to risk falling below accepted State standards and being denied the license necessary to begin operations. Indeed, it makes no sense to require Barclay to assume this risk by hiring new staff or obtaining different service suppliers in order to exercise its right to be a non-successor employer.

Moreover, before beginning its operations Barclay had to secure a certificate of need issued by the City of Chicago through its Health Systems Agency. Because possession of this certificate is crucial to whether or not a hospital can operate, Barclay would not make any significant operating decisions affecting the level, quality or scope of patient care until its issuance. A similar burden to refrain from major operational changes is not placed upon those who purchase assembly plants or retail establishments, since those industries are not pervasively regulated.

Barclay also had to receive accreditation from the JCAH in order to qualify for the federal government's Medicare program and to receive payments from private insurance carriers for patient services. Accreditation, therefore, was essential for Barclay to exist or to operate. Since the Joint Commission will only investigate and accredit hospitals with stable on-going programs, Barclay was effectively precluded from altering London's programs or staff usage when it began operation. If

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[9] *Hospital Licensing Act*, Ill. Rev. Stat. Ch. 111½, § 147; G.C. Exh. 9(a)-(f); Tr. 420-421.

[10] *Hospital Licensing Act, supra*, §151.1.

Barclay had elected, at that time, to implement its planned programmatic changes and to hire better qualified staff to begin to administer these new programs, the programs would have been in a shakedown or developmental stage. Barclay, therefore, would have run the risk of failing or delaying the accreditation examination. Once again, therefore, Barclay acted reasonably in a business-like manner when it determined to maintain London's programs and staff usage without substantial change when it began operations and until accreditation was assured.[11] Moreover, because it desired to implement quickly its planned program changes, Barclay requested and received an expedited accreditation investigation. Upon oral assurance in July that accreditation would be forthcoming, Barclay began to institute the program changes and to hire qualified staff to administer them.

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[11] At no time did Barclay mislead London's former employees concerning the reason for their retention. Soon after Charter's takeover, a Charter official, Dr. Cummings, stated in writing to the former London employees employed by Barclay:

> "Since we at Charter have taken over the operation of the hospital, we have been and are still in a shakedown or transition period. We have been and are evaluating the total situation here, including all operational procedures currently in the hospital. Our present continuation of the operation as it was in the past under London is merely an expedient to allow us to evaluate the entire situation in the hospital during this transition period.
>
> We have now, and have had from the time we came in here, definite plans to change some of the directions previously followed here and some of the operations in which the hospital previously engaged. We hope in the near future to begin implementing our own plan for the operations of this facility. We will keep you informed." (G. C. Exh. 9(b)).

Therefore, the employees were fully informed at the outset of Barclay's operations that their retention and the continuation of the services provided by London were but an expedient during a shakedown period.

The lower court's failure to recognize or give heed to the impact of governmental regulations or other industry requirements such as accreditation for insurance purposes when resolving the question of successorship presented in this case has placed Barclay in a position where it must either accept successorship and the attendant bargaining obligation or act contrary to the requirements of these regulations and its own rational business interests. No employer should be placed in this position.

CONCLUSION

This Petition for a Writ of Certiorari should be granted and the decision below set aside. At a minimum, the case should be remanded for reconsideration of the successorship issue in light of the need to accommodate principles designed for application in an unregulated workplace to hospitals whose freedom of action is severely limited by pervasive state regulation.

Respectfully submitted,

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APPENDICES

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APPENDIX A.	Order of the Court of Appeals, No. 80-1729 (7th Cir., May 7, 1981)
APPENDIX B.	Decision and Order of the National Labor Relations Board, 247 N.L.R.B. No. 144
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APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued March 30, 1981
May 7, 1981.

Before
Hon. Walter J. CUMMINGS, Circuit Judge
Hon. Floyd R. GIBSON, Senior Circuit Judge*
Hon. William J. BAUER, Circuit Judge

ILLINOIS HEALTH SERVICE, INC., d/b/a BARCLAY HOSPITAL,
Petitioner,

No. 80-1729 *vs.*

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES UNION LOCAL NO. 743, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Intervenor.

Petition for Review of an Order of the National Labor Relations Board, and Cross-Petition for Enforcement

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* The Honorable Floyd R. Gibson, Senior United States Circuit Judge, Eighth Circuit, sitting by designation.

ORDER

Barclay Hospital, Inc. petitions for review of an order of the National Labor Relations Board (NLRB) to recognize and bargain with Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The Board cross-petitions for enforcement of its order. In its petition for review, Barclay contends that the Board erred in finding it to be successor employer to the George J. London Memorial Hospital (London) and in certifying the union election results. We find these contentions to be without merit and enforce the Board's order.

On October 18, 1977, the union filed a petition for an election among non-professional employees at London Hospital, a psychiatric facility. On November 30, 1977, the election was held with the union obtaining twenty-nine votes in its favor, twenty-one against, and three challenged. After London filed objections to the conduct of the election and the Regional Director recommended that they be overruled, London, on January 13, 1978, filed exceptions with the Board concerning the Regional Director's report. On June 9, 1978, the Board, in a majority opinion, adopted the Regional Director's findings and recommendations and certified the union. *George J. London Memorial Hospital,* 236 N.L.R.B. 797 (1978). (Member Murphy filed a dissenting opinion).

On January 6, 1978, Charter Medical Corporation entered into an agreement to purchase London. On March 24, 1978, Charter took over daily operation and shortly thereafter renamed the hospital Barclay. The union, on July 29, 1978, demanded that Barclay bargain with it. Barclay refused, contending that the election was invalid because of union misrepresentations, and also contending that Barclay was not a successor to London. On October 12, 1978, the Board issued a complaint. A hearing was held before an administrative law

judge (ALJ) on February 27 and March 1, 1979. The ALJ, in a written memorandum opinion filed September 25, 1979, found Barclay had violated the National Labor Relations Act and ordered the hospital to bargain with the union. The ALJ rejected Barclay's argument that it was not a successor to London and that the union election was invalid. The Board concurred with the ALJ on February 12, 1980. *Barclay Hospital, Inc.*, 247 N.L.R.B. No. 144, [1980] NLRB Dec. (CCH) ¶ 16,820 (1980).

Successor employer

On appeal, Barclay contends that the Board erred in finding it to be the successor of London's operation. Barclay argues that the ALJ did not properly determine the time period at which successorship is to be decided. According to Barclay, the proper time was when Barclay hired its full complement of employees, which in Barclay's view did not occur until October 1978. Barclay also contends the ALJ erred in determining that both Barclay and London conducted substantially the same operation. We find no error in the ALJ's findings.

In reviewing the Board's findings, our inquiry is limited to whether they are supported by substantial evidence in the record as a whole. *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 488 (1951). Ordinarily, a "mere change of employers or of ownership in the employing industry" does not terminate the successor-owner's duty to bargain with the union. *NLRB* v. *Burns International Security Services, Inc.*, 406 U. S. 272, 279 (1972). As we stated in *Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F. 2d 1025, 1026-27 (7th Cir. 1969), when there is a "change of ownership not affecting the essential nature of the enterprise, the successor employer must recognize the incumbent union and deal with it as the bargaining representative."

The ALJ made the following factual findings regarding the continuity and similarity between the London and Barclay operations:

The findings * * * establish prior to purchasing London's facility the Respondent had knowledge London's employees in the unit had voted in a Board Election selecting the Union to represent them as their exclusive bargaining representative and of the pending proceedings before the Board on the certification issue.

The evidence * * * establishes the Respondent purchased the assets of its predecessor London including, *inter alia*, the land, building, machinery, equipment, furniture, fixtures, inventory, records, accounts, and certain contractual rights, and assumed certain of London's liabilities and obligations. Upon taking over the operation of the facility it did so without any interruption of services, assumed caring for London's former patients and, as had London, continued operating the facility as a mental health care facility. Not only did it retain all of London's supervisory personnel at the time of the takeover but, without hiring any new employees, it retained all of London's employees including those in the unit, and credited them with various benefits they had acquired while employed at London.

* * * *

Shortly after the takeover, the Respondent also adopted as its own London's policies and procedures covering the employees and their benefits; the bylaws, rules, and regulations for the medical and allied health professional staff; and its philosophy, goals, and objectives.

Although certain physical changes were made at the facility beginning several months or more after the takeover, such as building a patio, remodeling the lobby, installing psychiatric screens, and providing additional seclusion rooms, none of these changes could be deemed significant to affect the nature of its operations.

* * * *

These changes or contemplated changes in programs, policies and procedures or any others as may be reflected by the record are not, as urged by the Respondent, of a sufficient nature or extent to detract from finding the

Respondent to be a successor to London. Rather, since both London and the Respondent admittedly operated the facility as a mental health care facility such evidence further supports a finding of successorship.

Further, the evidence establishes at the time the Union's demand for bargaining was received by the Respondent on July 29, all but 8 of the 45 employees performing unit work had been employed by London at the time of the takeover and had continued working in their same job classifications. Thus, the unit had remained intact during this period and as Respondent's own records reflect, the Union clearly continued to represent a majority of employees in the Unit.

These findings are fully supported by the record. The mere fact that Barclay contemplated minor changes in the structure of the psychiatric hospital to be implemented in the future does not change the fact that the facility continued to operate in essentially the same manner as it did prior to the purchase.[1]

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[1] The Board's factual conclusions in *Galis Equipment Co.*, 194 N.L.R.B. 799 (1972), and *Georgetown Stainless Manufacturing Corp.*, 198 N.L.R.B. 234 (1972), are not supportive of Barclay's position. In *Galis* the Board found that where the new owner switched its operation from 80 percent machine-shop work to 80 percent fabrication work and the change was effectuated within five months, then no successor was present. 194 N.L.R.B. at 799. In *Georgetown*, the Board again found lack of successorship where the new owner ceased to do business as a going concern and, after a hiatus of three weeks, converted a factory previously used primarily for producing custom-made sinks to one making cheap mass-produced sinks. The Board in *Georgetown* adopted the Trial Examiner's order, which found that "on balance" the new business "was not a continuity of the same business operations." 196 N.L.R.B. at 238. In the present case, the ALJ specifically found that "since London and Respondent [Barclay] admittedly operated the facility as a mental health care facility such evidence further supports a finding of successorship." The essential characteristic of the hospital, its psychiatric nature, continued under the new owners. Material changes in the fundamental nature of the hospital were not implemented by Barclay.

Nor did the ALJ err in finding that on July 29, 1978, the date of the union's bargaining demand, the union continued to represent a majority of the employees. This date was the proper one to look to in determining Barclay's bargaining obligation. The hospital had been sold over six months prior and Barclay was in control of daily operations for over four months. During this period, Barclay implemented few changes. The fact that Barclay may have planned future changes should not affect the bargaining obligation of Barclay, given the actual operation of the hospital at the time of the union's demand.

Barclay's reliance on *Pacific Hide & Fur Depot, Inc.* v. *NLRB*, 553 F.2d 609 (9th Cir. 1977), is misplaced. In *Burns, supra*, 406 U.S. at 295, the Court suggested that it may be appropriate to look to the time the "successor employer has hired his full complement of employees" to determine whether the employer has a duty to bargain. *Pacific Hide* applied this principle to a situation where the number of employees "steadily expanded as planned [7 to 19], the period of time involved was short, less than sixty days, and the 'full complement' was nineteen * * *." *Id.*, 553 F.2d at 614. None of these factors was present in the case here considered.

Election validity

Barclay contends the election results were tainted by a leaflet distributed by the union to employees prior to the election. The leaflet read in relevant part:

> [T]he National Labor Relations Board (NLRB) has issued a complaint against the hospital for unfair LABOR PRACTICE in the firing of Diane Erickson .... For the Labor Board to issue a complaint and order a hearing, there has to be merit in the case all in Diane's favor.

Barclay argues that the leaflet created the impression in the minds of voting employees that the Board, by issuing its complaint, had established as a fact that their employer violated the law by terminating a union adherent. Petitioner's brief at 36. The Board, however, reached a different conclusion when it reviewed the leaflet:

> The leaflet writer's contention that since the Board has issued a complaint 'there has to be merit in the case' is considerably less than the bald assertion—as our colleague all but expressly conceives it—that the Board has tried the Employer and adjudged it guilty. The statement regarding the Board's standards for issuing complaints are true. Regional Directors only issue complaints and order hearings if they find some merit in the charge, and our casehandling manual so states. The fact that the writer argues that all of the merit is 'in Diane's favor' is clearly the writer's opinion and the bias is evident. The leaflet asserts both that a hearing is to be held and that a long delay 'could' cost the employer more money, making it clear that the case had not been adjudicated.
>
> We have difficulty comprehending our colleague's construction of the Petitioner's conduct as 'impugning the integrity of the Board.' Indeed, viewing the leaflet in its entirety we cannot say that there has been any misrepresentation of the Board's actions.

George J. London Memorial Hospital, 236 N.L.R.B. at 797 (1978).

The Board found the leaflet to be a substantially accurate, although polemicized, statement of the Board's procedure in issuing complaints. We cannot agree with Barclay's assertion that employees who read the leaflet could "conclude only that the Board already has judged their employer to have violated the law." Petitioner's brief at 41. There was no "substantial mischaracterization" of the Board's procedure, even when viewed from the employees' perspective. *Compare Allis Chalmers Corp.,* 252 N.L.R.B. No. 112, [1980-81] N.L.R.B. Dec. (CCH) ¶ 17,465 (1980), *motion for review of supplemental order granted,* No 78-3322 (5th Cir. Dec. 18, 1980), *and Melrose-Wakefield Hospital Association* v. *NLRB,* 615 F.2d 563, 569 & n.3 (1st Cir. 1980), *with Formco, Inc.,* 233 N.L.R.B. 61, 62 (1977), *and Dubie-Clark Co.,* 209 N.L.R.B. 217, 218 (1974).

Order enforced.

APPENDIX B

FJT

247 NLRB No. 144

D—6074
Chicago, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BARCLAY HOSPITAL, INC.

and

WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES, LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On September 25, 1979, Administrative Law Judge Thomas D. Johnston issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[1] The General Counsel's motion to strike evidence not adduced at the hearing, which the Respondent opposed, is denied.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[2] and has decided to affirm the rulings, findings,[3] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Barclay Hospital, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

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[2] Although we need not deal with all the implications of the Respondent's argument that it has a right not to be a successor, we note that "successorship" is a labor relations conclusion derived from economic facts and that a "right" not to become a successor would suggest a right to make employment decisions based on representational considerations clearly proscribed by *N.L.R.B.* v. *Burns International Security Services*, 406 U. S. 272, fn. 5 (1972).

[3] Contrary to the Respondent, the Administrative Law Judge appropriately determined the issue of whether the Respondent is a successor to London as of the date of the Union's demand for recognition. The Administrative Law Judge found, and we agree, that neither the changes contemplated by the Respondent prior to the Union's demand nor the changes eventually implemented rendered the Respondent's operation substantially different from that of London Hospital. Further, we note that there is no contention that any of the changes cited by the Respondent have rendered the certified unit inappropriate.

D—6074

Dated, Washington, D. C. February 12, 1980

JOHN H. FANNING, Chairman
John H. Fanning

HOWARD JENKINS, JR., Member
Howard Jenkins, Jr.

JOHN C. TRUESDALE, Member
John C. Truesdale

NATIONAL LABOR RELATIONS BOARD

(SEAL)

JD-678-79
Chicago, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

BARCLAY HOSPITAL, INC.[1]

and

WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES, LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Elaine S. Fox, Esq. and *Katherine L. Gerstenberger, Esq.*, for the General Counsel.

Julian D. Schreiber, Esq., *Jerry Kronenberg, Esq.*, and *Rosemary A. McGuire, Esq. (Borovsky, Ehrlich & Kronenberg)*, of Chicago, IL, for the Respondent.

Joel A. D'Alba, Esq. (Asher, Greenfield, Goodstein, Pavalon & Segall, Ltd.), of Chicago, IL, for the Charging Party.

DECISION

Statement of the Case

THOMAS D. JOHNSTON, Administrative Law Judge: This case was heard at Chicago, Illinois, on February 27 and 28 and

[1] The correct name appears as amended at the hearing.

March 1, 1979, pursuant to a charge filed on September 15, 1978[2] by the Warehouse, Mail Order, Office, Technical and Professional Employees, Local 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein referred to as the Union), and a complaint issued on October 12.

The complaint, which was amended at the hearing, alleges that Barclay Hospital, Inc. (herein referred to as the Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (herein referred to as the Act) by failing and refusing as the successor to George J. London Memorial Hospital (herein referred to as London) to bargain collectively with the Union as the exclusive bargaining representative of its employees in the appropriate unit certified by the Board with respect to wages, hours and other terms and conditions of employment.

The Respondent in its answer dated October 26, which was amended on November 30, denies having violated the Act. It asserts as affirmative defenses (1) the Board's certification of the Union in *George J. London Memorial Hospital*, 236 NLRB No. 82 (1978), was invalid and that the Union was not the exclusive collective-bargaining representative of any bargaining unit of London's employees,[3] and (2) the Respondent is not a successor to London and has no legal obligation to bargain with the Union as the collective-bargaining representative of any of Respondent's employees.

The issues involved are whether the Respondent is a successor to London; and whether the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union as the exclusive bargaining representa-

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[2] All dates referred to are in 1978 unless otherwise stated.

[3] This affirmative defense is hereby rejected based upon the Board's decision in the case cited.

tive of the employees in the appropriate unit certified by the Board with respect to wages, hours and other terms and conditions of employment.

Upon the entire record[4] in this case[5] and from my observations of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent,[6] I hereby make the following:[7]

Findings of Fact

I. The Business of the Respondent

Respondent, a for-profit Illinois corporation, operates a mental health care facility located at Chicago, Illinois. During the period from March 24 when it began operations at the facility until February 27, 1979, a representative period, the Respondent in the course of its operations derived gross revenues in excess of $250,000, and it also received goods and services, valued in excess of $5,000, directly from points located outside the State of Illinois.

Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[4] The General Counsel's unopposed motion dated April 24, 1979 seeking to correct the transcript is hereby granted.

[5] A joint motion dated May 10, 1979 was filed by the parties seeking to include in the record a document identified as Joint Exhibit 5(b) entitled "Exceptions To The Acting Regional Director's Report On Objections" on the grounds it was inadvertently omitted, and a request that Joint Exhibit 5, which is already in evidence, be remarked as Joint Exhibit 5(a). The motion is hereby granted.

Further, in accordance with my ruling at the hearing reserving an exhibit number for an exhibit to be submitted, a Stipulation identified as Joint Exhibit 14 with attached Appendix A is hereby received in evidence.

[6] The Union did not submit a brief.

[7] Unless otherwise indicated the findings are based upon the pleadings, admissions, stipulations, and undisputed evidence contained in the record which I credit.

II. The Labor Organization Involved

Warehouse, Mail Order, Office, Technical and Professional Employees, Local 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

A. Background

London, a not-for-profit Illinois corporation, operated a licensed 79-bed[8] mental health care facility (herein referred to as the facility) located at 4700 North Clarendon Avenue, Chicago, Illinois, where it was engaged in primarily treating public type patients. Included among its supervisory personnel were Administrator Christine Grothouse, Medical Director Dr. Gomez, Assistant Medical Director Dr. Hendler, Director of Nursing Roberta McDermott, Head of the Housekeeping Department Ed Stanislowki, Head of the Maintenance Department Joe Verhayen, and Director of Personnel Services Shari MacFarlane.

The employees of London were represented by the Union in a unit described as follows:

> All employees of the Employer now located at 4700 North Clarendon, Chicago, Illinois, but excluding all professional employees, registered nurses, licensed practical nurses, business office clericals, medical records clericals, medical doctors, psychologists, guards and supervisors as defined in the Act.

The Union was certified by the Board as the exclusive representative of London's employees in this unit in its decision issued on June 9 in *George J. London Memorial Hospital, supra.* This certification resulted from an election held on November

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[8] The facility had been found suitable for 116 beds by the Commission for Health Planning and Resources Development of the City Council of Chicago.

30, 1977, which the Union won,[9] that was conducted pursuant to a Stipulation for Certification Upon Consent Election Agreement approved on November 4, 1977. Although London filed objections to the election on December 7, 1977, the Acting Regional Director of Region 13 in his Report on Objections issued on December 23, 1977 recommended those objections be overruled, which recommendations were adopted by the Board.

Job classifications of employees comprising the unit included mental health associate, activity services employee, dietary employee, day hospital employee, clinical services employee, housekeeping employee, maintenance employee, ward secretary, central supply employee, and purchasing and receiving employee.

B. The Successor Issue

Charter Medical Corporation (herein referred to as Charter) purchased London's facility, effective January 6, subject to Charter obtaining the necessary licenses and Certificate of Need[10] which it subsequently obtained. A warranty deed was executed on March 23 by London conveying the property to Charter.

Under the terms of the purchase agreement London's assets acquired by Charter included the machinery; equipment; furniture; fixtures; supplies; drugs and medications; real estate with improvements at that locations subject to a mortgage Charter agreed to assume; accounts and notes receivable; bank accounts; cash; securities; deposits; prepaid items; books;

[9] The results of the election were 29 voters for, and 21 votes against, the Union, with 3 challenged ballots out of a total approximately 63 eligible voters.

[10] To operate a Certificate of Need is required from the Cook County Health System Agency approving the facility.

records; files; forms; medical histories of patients; employee records; rights to supply, fuel, utility and service contracts and equipment leases; and rights under assignable licenses or permits. Charter also agreed to assume certain of London's obligations such as those reflected on the books and records at closing date; contracts, leases and written commitments assigned to it; insurance bills for health benefits paid to London's employees; reimbursement for unemployment compensation benefits paid to former London employees; certain accountant, attorney and consultant fees; and obligations under a security agreement regarding accounts receivable.

The purchase agreement also provided there would be no mass discharges or layoffs of London's employees for at least 18 months except for labor strikes or stoppages, financial hardship, loss of license or similar factors.

Both prior to the purchase of the facility as reflected in a letter from Charter's Vice President M. G. Woodward to London's Chairman of the Board Alfred London dated November 23, 1977 and the minutes of a meeting held by Charter's Board of Directors on December 8, 1977 and at the time of purchase as mentioned in the purchase agreement itself, Charter was aware of the Union's status as it existed at London.

Respondent,[11] an Illinois for-profit corporation, which is wholly owned by Charter, took over the operation of the facility from London effective March 24[12] and has continued since that date to operate it as a mental health care facility treating private and medicare type patients.

London's Administrator Grothouse became the Administrator and President of the Respondent. Charter's Vice Presi-

[11] Respondent's original name before being changed was Illinois Health, Inc. d/b/a Barclay Hospital.

[12] London as of that date has no longer operated a mental health care facility.

dent Woodward and Vice President Ray Stevenson are members of the Respondent's Board of Directors and Stevenson is also its Vice President.

The takeover of the facility by the Respondent occurred without any interruption of services and the Respondent continued caring for those patients London had been treating.

According to Administrator Grothouse, the Respondent at the time of the takeover retained all of London's supervisory personnel with any changes thereafter made being due to attrition.

The payroll records for London and the Respondent show at the time of the takeover of the facility all of those persons employed by London continued working for the Respondent without any new employees being hired. They were not required to fill out applications or serve probationary periods and were given credit by the Respondent for their sick time, overtime, vacation and holidays they had accrued at London. Included among those persons retained were all 52 of the employees in the unit at London.

During the period from March 6 through 13, organizations which had written agreements with London to provide various medical services such as pharmacy, neurology, and x-ray and radiology as well as suppliers, agreed in writing with the Respondent to continue providing their services to the Respondent on the same terms and conditions.

On May 5 Respondent's Board of Directors, as reflected by its minutes, adopted London's Employee Personnel Manual which sets forth the policies and procedures covering the employees and their employee benefits. These provisions since that date have remained substantially intact. It also adopted as its written bylaws and rules and regulations of the medical and allied health professional staff those which had been in effect at London. Further, it also adopted London's written philosophy, goals and objectives as its own.

The stipulated evidence and records prepared by Director of Personnel Services MacFarlane show that out of the 52 employees employed in the unit by London, who were retained by the Respondent, 37 of them[13] were still employed by the Respondent when it received the Union's bargaining demand on July 29, discussed *infra*, and they remained in their same job classifications.[14]

Between the takeover by the Respondent on March 24 and the Union's bargaining demand received on July 29 the Respondent only hired 8 new employees[15] who performed unit work and were still employed on July 29. The only other three

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[13] Their names were Evelyn Chambers, Chester Cichonski, Asuncion Corpin, Gary Eder, Sarah Ellis, Elizabeth Felix, Charles Fremling, Anna Gelberger, John Harrison, Essie Hartzog, Ann Hogan, Alma Jones, Mattie Jones, Jean-Jacques Joseph, Edwin Kopytko, William Kotowicz, Diane Lagoski, Aleyamma Mathew, Irene McMorris, Joseph Metzinger, Hisako Miyake, Daniel Navarro, Carol Negussie, Annie Peoples, Michalina Prybocki, Palma Ramsay, Bernice Rembert, Yun Sook Rho, Randall Ristow, Everlina Rodgers, Celia Rosales, Nestor Rosales, Randolph Schild, Deborah Smith, Ernest Stavropoulos, Ollie Washington, and Arthur Winslow.

[14] The only changes which thereafter occurred in their job classifications were as follows: Aleyamma Mathew was changed from mental health associate to nurse tech on January 15, 1979; Gary Eder from dietary to housekeeping on September 3; Celia Rosales from dietary to psychiatric aide on November 20; and Yun Sook Rho from mental health associate to staff nurse on October 15. Changes within the job classification of mental health associate were also made on January 15, 1979 for Elizabeth Felix, Essie Hartzog, Annie Peoples, Palma Ramsay, Randall Ristow, Joseph Metzinger and Hisako Miyake.

[15] Their names were Cynthia Allen, Keith Allen, Debra Bernstein, Julio Gonzalez, Raul Rodriguez, Joyce Sencion, Hans Toecker and Bridget Travis.

new employees[16] hired during this period to perform unit work had been terminated before July 29.

The job classifications of all these newly hired employees mentioned, the first of whom was hired on April 10,[17] included dietary, housekeeping, day hospital, activity services-recreational therapy, and activity services-occupational therapy.

Thus, as of July 29 all but 8 of the 45 employees of the Respondent performing unit work had been employed by London at the time of the takeover and had continued working in their same job classifications.

The facility under both London and the Respondent, as described by Administrator Grothouse and Charter's Vice President James Smith, has operated as a mental health facility.[18] Both were certified by the Joint Commission on Accreditation of Hospitals and were members of the American Hospital Association. London had a residency program approved by the American Medical Association which was extended to the Respondent and it also had an affiliation with the Chicago Medical School which continued at the Respondent until at least July 1.

The same floors were used by both London and the Respondent for patient care, offices, and services. Food was catered in with patients eating their meals in lunchrooms located on each floor, while employees and guests used the cafeteria. Patients had semi-private rooms. The hours of the three work shifts remained the same.

Following the takeover by the Respondent certain changes did occur. The physical changes included converting part of the

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[16] Their names were Joselito Galura, Katherine Honkavaara, and Rose Pennington.

[17] Katherine Honkavaara was hired on April 10.

[18] London received federal funding for treating medicaid patients until March 1 when it was no longer eligible.

doctor's parking lot into an enclosed patio area for use by patients which occurred in September; remodeling the lobby which was still in progress in late February 1979; installing psychiatric screens[19] on the windows on certain floors in October or November; and setting up seclusion rooms[20] on the third and fourth floors about September 27 in addition to the seclusion room already located on the second floor where London had its only seclusion room.

There were also changes in programs and services which took place following the takeover. Administrator Grothouse, upon being asked what changes had occurred since the takeover, responded by saying the main changes she saw were the adolescent unit and the approaching of the analytic unit. Neither of these programs had existed at London.

On February 17, which was prior to the takeover, a meeting was held between representatives of London and the Respondent including, *inter alia*, Charter's Vice President Smith and London's Administrator Grothouse. During this meeting, according to both Smith and Grothouse, there was a discussion about certain programs the Respondent was considering instituting after taking over the facility. These programs included establishing an adolescent treatment program, a long-term analytic unit, and an alcoholic treatment program. Respondent's records reflect that at another meeting held on May 30 attended by Vice President Smith, the adolescent treatment

[19] These are metal attachments on the outside of the windows used to prevent occupants from getting out.

[20] These rooms, as described by the Respondent's policies and procedures, are utilized as a protective environment for patients when they may be injurious to themselves or others and also to provide a controlled non-stimulating environment when the patients are unable to control their behavior.

program[21] and the alcoholic treatment program were still considered as options for planning purposes. However, the idea of the alcoholic treatment program was subsequently dropped a couple of months later.

Based upon the testimony of Doris Nixon, who is the Respondent's Director of Clinical Services,[22] the adolescent treatment program was established on the third floor of the facility and is treating patients, the first of whom was admitted on August 31, ranging in ages from 13 to 19 years old. The type of treatment used as described by her is a behavior modification program whereby a patient is rewarded for the type of behavior desired and punished for the type behavior not desired. Treatment techniques employed include group therapy and psychodrama[23] where the patients in the latter instance act out their problems.

Respondent's records, dated August 11, list the job classifications for staffing the adolescent unit as registered nurse, social worker, psychiatric aide, ward secretary, and activities therapist. However, according to Director Nixon, the employees assigned to work on the adolescent unit included clinical specialists. Four clinical specialists, a new job classification, were first hired on August 15 to work on the adolescent unit.[24] Their duties, as described by Nixon, include talking to patients about their problems and making interpretations about what

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[21] While Vice President Smith first testified the final decision to proceed with the adolescent unit was made in April or May, he subsequently acknowledged he did not know when the decision was made.

[22] Nixon, who had previously worked at London as an outpatient coordinator, assumed this position in August.

[23] Respondent's records reflect the use of psychodrama began on the adolescent unit on December 12.

[24] According to Director Nixon the number of clinical specialists had increased to 12 by December 1.

the patient has experienced and talked about; running group and community meetings; taking a family history from the patient's parents; and asking patients certain questions furnished by the physician about their backgrounds. Their qualifications required at least a master's degree in social work or psychology and preferably several years experience in an adolescent program. Nixon testified the clinical specialists are being hired to replace employees in the mental health associate classification which is being phased out, except those employees still working in those classifications are being retained in those classifications. Although Nixon first attempted to describe the duties of a mental health associate, she subsequently acknowledged she wasn't familiar with their duties at either London or the Respondent.

Joseph Metzinger, who is employed as a mental health associate by the Respondent and formerly worked in that classification at London, described his duties as assisting the nursing staff with patient care determined by the nursing plan worked out with the nursing staff from the team conference and admission conference. This included physical and nursing type care, bathing patients, helping with trays, and talking to patients to learn what they were thinking about.

The only other new job classification besides clinical specialists hired at the facility since the takeover was that of psychiatric aide. The records show the first employee hired as a psychiatric aide occurred on July 31 when Sook Ja Choi, who had previously worked as a unit employee for London and then the Respondent as a mental health associate prior to her termination on May 13, was rehired on July 31 as a psychiatric aide. Between September 5 and December 12, five new employees were hired as psychiatric aides[25] and as noted

[25] Their names were George Dawson, Julius Evans, Oliver Horan, Leo Griffin, and Oscar Pestelos.

previously a former London employee, Celia Rosales, was changed from dietary to psychiatric aide on November 20.

Joseph Metzinger, based upon his observations of the psychiatric aides who worked on his unit, stated without contradiction they had the same job description as the mental health associate with the exception they could not do any charting or paperwork. Respondent's records dated January 2, 1979 supports Metzinger's testimony that psychiatric aides do not do charting.

The stipulated evidence and records of job descriptions prepared by Director of Personnel Services MacFarlane establish that those employees classified as clinical specialists and psychiatric aides are included in the unit.

Although the adolescent unit has a 24-bed capacity, Administrator Grothouse acknowledged about Thanksgiving it only had about 12 patients and the patient load did not begin increasing until the end of January 1979.

Beginning in October a schoolroom staffed by three teachers and a director hired between the end of October and February 1, 1979 was set up for those patients being treated in the adolescent unit for which school work they were given school credits.

While London did not have an adolescent unit it admittedly did treat adolescent patients.

The psychoanalytic program adopted by the Respondent is based upon a plan submitted by Donald Schwartz who has been employed as a consultant by the Respondent since July. Schwartz described this program, which will house 17 patients and be located on the fifth floor, as providing a facility for the treatment of relatively disturbed patients who generally have more difficulty with treatment in an outpatient setting or in more traditional shorter term hospitals where if their financial

resources permit they will have a stay of 2 or 3 years of expensive psychoanalytic treatment. The purpose of the program is to correct the emotional problems in a more permanent lasting way and involves more intensive treatment which is aimed at more distrubed patients and takes a considerable time. Treatment is founded upon psychoanalysis. It works by establishing an environment where the patient feels safe to have a therapeutic regression which means they have access to their very early primitive feelings in an attempt to understand them and rework them so they can integrate in a way called more adult and so they can function in the real world.

Schwartz stated he first discussed developing the psychoanalytic program with representatives of Charter and Administrator Grothouse about the middle of July and again in November. However, his written recommendations for the plan were not submitted until about November 24 or 25 and the final decision approving it was not made until December. Although Schwartz stated two patients amenable to this type program were admitted to the Respondent, one in late August or September and the other in early 1979, he acknowledged at the time of the hearing held on March 1 that the unit still had not been implemented and they were hoping this would be done in late spring or early summer.

The delays for implementing this program were explained by Administrator Grothouse as a lack of space available to house the unit and a low patient census around Thanksgiving.

Another program instituted at the Respondent was the team approach concept. Schwartz, who stated the idea originated with him as a means of attracting other psychiatrists to use the facility and in order to obtain more business, described

it as dividing employees into clinical teams comprised of employees from nursing, activities therapy, and clinical services. The idea is to provide a setting in which information about the patient can be transmitted from the patient's psychiatrist to the team assigned to that patient, within the team itself, and from the team to the rest of the employees on that floor about how the patient is to be treated and what kind of intervention, if any, that the staff will have in the patient's therapy. According to Schwartz a team system is more demanding upon the staff because it requires more communication and interaction between them and requires them to become part of the therapy of the patient if required by the psychiatrist. Schwartz, who stated they began planning the team approach concept in late August or September, acknowledged the program, which is still developing, did not begin on the fourth floor[26] until December and was not planned to start on the second floor until after the hearing held on March 1.

Following the takeover of the facility a walk-in type emergency room service for psychiatric patients previously operated by London was discontinued by the Respondent in March.[27]

C. The Refusal to Bargain

The Union's Business Representative Robert Simpson sent Administrator Grothouse a letter dated June 16, referring to the Board's decision certifying the Union and requested that

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[26] The team on the fourth floor as described by Schwartz is comprised of job classifications including nurses, mental health associates, social workers, and activity therapists.

[27] The record does not establish what, if any, staff changes were affected by discontinuing this service.

collective-bargaining negotiations begin immediately and asked Grothouse to contact him about arranging a meeting date.

The Respondent did not receive this letter until July 29. Its Attorney Kronenberg responded by letter dated August 7 which provided, in pertinent part, as follows:

> Mrs. Grothouse has asked and authorized me to respond to you that the management of the Hospital must decline your request to commence bargaining at this time because of the Hospital's belief that under the law, properly interpreted, it has no such bargaining duty.

A memorandum from Administrator Grothouse to Vice President Stevenson dated August 11 contained, in pertinent part, as follows:

> Barclay, through its lawyer, has notified Local 743 that it must decline their request to commence bargaining at this time because of the Hospital's belief that under the law, properly interpreted, it has no such bargaining duty. Particularly, I feel that Local 743 at this time is not a representative of the employees now on Barclay's payroll. Thirty-seven (37) of the London employees who were interested in having themselves represented by the Union have left the Hospital's employment to go on to other endeavors.
>
> This only leaves a small number of London employees, who will be outnumbered by the Barclay employees.

Between July 29, at which time 37 of the 45 employees performing unit work were former London employees and August 11 no new employees were hired to perfom unit work. One of those former London unit employees, Randolph Schild, was terminated on August 4 while another former London unit employee, Sook Ja Choi, who terminated her employment with the Respondent on May 13, was rehired on July 31 to perform unit work.

D. Analysis and Conclusions

The General Counsel contends, contrary to the Respondent's denials, that the Respondent is a successor to London and violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union as the exclusive bargaining representative of the employees in the appropriate unit certified by the Board, with respect to wages, hours and other terms and conditions of employment.

The Respondent contends it had no lawful obligation to bargain with the Union and that the program, policies and procedures employed by the Respondent since the takeover of the facility preclude finding it to be a successor of London.

Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act. Section 8(a)(5) of the Act prohibits an employer from refusing to bargain collectively with the representative of its employees.

Under the principles of *Burns*,[28] as expressed by the Supreme Court, the mere change of ownership in the employing industry is not such an "unusual circumstance" as to affect the force of the Board's certification within the normal operative period if a majority of employees, after the change of ownership, were employed by the predecessor employer. Where the bargaining unit remains unchanged and a majority of the employees hired by the successor are represented by a recently certified bargaining representative, the successor is required under Section 8(a)(5) of the Act to bargain with the incumbent union.

The obligation on the part of the successor employer to bargain with the incumbent union exists unless it is demonstrat-

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[28] *N.L.R.B.* v. *Burn* [*sic*] *International Security Services, Inc.*, 406 U.S. 272 (1972).

ed that the union, which is recognized as the majority representative of the employees in the unit to which the employer succeeds, no longer represents a majority of the employees on the date of the refusal to bargain, or that the refusal to bargain was grounded on a good-faith doubt based upon objective considerations of the union's majority status. *First Food Ventures, Inc.*, 229 NLRB 1228, 1230 (1977).

The initial issue to be resolved is whether the Respondent is a successor to London.

The crucial inquiry in determining whether a purchaser is a successor for purposes of Section 8(a)(5) is the continuity of the employing industry, which requires considering the totality of the circumstances surrounding the transfer. *Radiant Fashions, Inc.*, 202 NLRB 938, 940 (1973).

The findings *supra*, establish prior to purchasing London's facility the Respondent had knowledge London's employees in the unit had voted in a Board election selecting the Union to represent them as their exclusive bargaining representative and of the pending proceedings before the Board on the certification issue.

The evidence, *supra*, establishes the Respondent purchased the assets of its predecessor London including, *inter alia*, the land, building, machinery, equipment, furniture, fixtures, inventory, records, accounts, and certain contractual rights, and assumed certain of London's liabilities and obligations. Upon taking over the operation of the facility it did so without any interruption of services, assumed caring for London's former patients and, as had London, continued operating the facility as a mental health care facility. Not only did it retain all of London's supervisory personnel at the time of the takeover but, without hiring any new employees, it retained all of London's employees including those in the unit, and credited them with various benefits they had acquired while employed at London.

Organizations which provided medical services and supplies to London continued providing them to the Respondent on the same terms and conditions.

Shortly after the takeover, the Respondent also adopted as its own London's policies and procedures covering the employees and their benefits; the bylaws, rules, and regulations for the medical and allied health professional staff; and its philosophy, goals, and objectives.

Although certain physical changes were made at the facility beginning several months or more after the takeover, such as building a patio, remodeling the lobby, installing psychiatric screens, and providing additional seclusion rooms, none of these changes could be deemed significant to affect the nature of its operations.

While certain changes in services and programs were planned or subsequently instituted by the Respondent, the only major changes, according to Administrator Grothouse, who served in that capacity at both London and the Respondent, were the establishment of an adolescent unit and plans for a psychoanalytic program. However, Respondent's adolescent unit which treated adolescents in a unit environment, unlike London where they were treated individually, did not become operational until the end of August, and the psychoanalytic program, which was not finally approved until December, was still not operational at the time of the hearing held almost a year after the takeover of the facility. Another program, described as the team approach concept, which unlike the adolescent unit psychoanalytic program was not considered prior to purchasing the facility, was not put into effect until December.

While the two new employee job classifications were created, namely, clinical specialist and psychiatric aide, employees were not hired for these positions until after the Respondent

had received the Union's bargaining demand and the evidence further establishes employees performing these jobs were considered as unit employees.

These changes or contemplated changes in programs, policies and procedures or any others as may be reflected by the record are not, as urged by the Respondent, of a sufficient nature or extent to detract from finding the Respondent to be a successor to London. Rather, since both London and the Respondent admittedly operated the facility as a mental health care facility such evidence further supports a finding of successorship.

Further, the evidence establishes at the time the Union's demand for bargaining was received by the Respondent on July 29, all but 8 of the 45 employees performing unit work had been employed by London at the time of the takeover and had continued working in their same job classifications. Thus, the unit had remained intact during this period and as Respondent's own records reflect, the Union clearly continued to represent a majority of employees in the unit.

Under these circumstances and for the reasons discussed, I find the Respondent was a successor to London.

Having found the Respondent to be a successor to London, the remaining issue is whether the Respondent unlawfully refused to bargain with the Union.

The findings, *supra,* establish following the issuance of the Board's decision on June 9, certifying the Union as the exclusive bargaining representative of London's employees in the appropriate unit, the Union requested in writing that the Respondent commence negotiations, which the Respondent, after receiving the request on July 29, refused to do. The only reason given to the Union by the Respondent for its refusal to bargain was it had no duty under the law to bargain with it.

While Administrator Grothouse further indicated in a memorandum dated August 11, but never conveyed to the Union, that she felt the Union didn't represent the employees then on the payroll, the findings, *supra*, based upon Respondent's own records including those acquired by it from London, clearly refutes this position.

Since the Respondent is the successor to London and the Union, which was certified by the Board on June 9 as the exclusive bargaining representative of London's unit employees, continued at the time its demand for bargaining was received by the Respondent on July 29 to represent a majority of Respondent's employees in the unit which remained intact, and of which the Respondent had knowledge, I reject Respondent's defenses as being invalid and find the Respondent violated Section 8(a) (5) and (1) of the Act by failing and refusing since July 29 to bargain with the Union with respect to those employees in the appropriate unit.

Conclusion of Law

1. Barclay Hospital, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Barclay Hospital, Inc. is the successor to George J. London Memorial Hospital.

3. Warehouse, Mail Order, Office, Technical and Professional Employees, Local 743, International Brotherhood of Teamsters, Chaffeurs, Warehousemen and Helpers of America, is a labor organization within the meaining of Section 2(5) of the Act.

4. All employees of the Employer now located at 4700 North Clarendon, Chicago, Illinois, but excluding all profes-

sional employees, registered nurses, licensed practical nurses, business office clericals, medical records clericals, medical doctors, psychologists, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. The Union is now, and at all times material herein has been the certified and exclusive representative of all the employees of the Respondent in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

6. By refusing since July 29, 1978, to bargain with the Union as the exclusive bargaining representative of the employees in the aforesaid unit, Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. Accordingly, the Respondent shall be ordered to recognize and bargain collectively with the Union with respect to the rates of pay, wages, hours, and other terms and conditions of employment of the unit employees, and if any understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the unit will be accorded the services of their certified bargaining representative

for the period provided by law, I shall recommend that the initial period of certification be construed as beginning on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); and *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd 383 F. 2d 600 (C. A. 5, 1964), cert. denied 379 U. S. 817 (1964).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:[29]

ORDER

Respondent, Barclay Hospital, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively concerning rates of pay, wages, hours and other terms and conditions of employment with the Warehouse, Mail Order, Office, Technical and Professional Employees, Local 743, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following unit:

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[29] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

All employees of the Employer now located at 4700 North Clarendon, Chicago, Illinois, but excluding all professional employees, registered nurses, licensed practical nurses, business office clericals, medical records clericals, medical doctors, psychologists, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain with the Warehouse, Mail Order, Office, Technical and Professional Employees, Local 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Chicago, Illinois, facility, copies of the attached notice marked "Appendix."[30] Copies of said notice on forms furnished by the Regional Director for Region 13, shall after being duly signed by the

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[30] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Respondent's authorized representative, be posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

It is further ordered that the amended complaint be, and hereby is, dismissed insofar as it alleges unfair labor practices not specifically found herein.

Dated, Washington, D. C. September 25, 1979

THOMAS D. JOHNSTON
Thomas D. Johnston
Administrative Law Judge

APPENDIX C

NATIONAL LABOR RELATIONS ACT

29 U. S. C. § 151 *et seq.*

29 U. S. C. § 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)—(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

HOSPITAL LICENSING ACT

ILL. REV. STAT. CH. 111½ § 142 *et seq.*

§ 142. Citation

This Act may be cited as the Hospital Licensing Act.

§ 143. Purpose of act

The purpose of this Act is to provide for the better protection of the public health through the development, establishment, and enforcement of standards (1) for the care of individuals in hospitals, (2) for the construction, maintenance, and operation of hospitals which, in light of advancing knowledge, will promote safe and adequate treatment of such individuals in hospitals, and (3) that will have regard to the necessity of determining that a person establishing a hospital have the qualifications, background, character and financial resources to adequately provide a proper standard of hospital service for the community.

§ 144. Definitions

As used in this Act:

(A) "Hospital" means any institution, place, building, or agency, public or private, whether organized for profit or not, devoted primarily to the maintenance and operation of facilities for the diagnosis and treatment or care of two or more unrelated persons admitted for overnight stay or longer in order to obtain medical, including obstetric, psychiatric and nursing, care of illness, disease, injury, infirmity, or deformity.

The term "Hospital", without regard to length of stay, shall also include:

(a) any facility which is devoted primarily to providing psychiatric and related services and programs for the diagnosis and treatment or care of two or more unrelated persons suffering from emotional or nervous diseases;

(b) all places where pregnant females are received, cared for, or treated during delivery irrespective of the number of patients received.

The term "Hospital" includes general and specialized hospitals, tuberculosis sanitaria, mental or psychiatric hospitals and sanitaria, and includes maternity homes, lying-in-homes, and homes for unwed mothers in which care is given during delivery.

The term "Hospital" does not include (1) any person or institution required to be licensed pursuant to "An Act in relation to the licensing and regulation of homes for the maintenance, care, and nursing of persons who are ill or physically infirm", approved July 17, 1945, as heretofore or hereafter amended;

(2) Hospitalization or care facilities maintained by the State or any department or agency thereof, where such department or agency has authority under law to establish and enforce standards for the hospitalization or care facilities under its management and control;

(3) Hospitalization or care facilities maintained by the Federal Government or agencies thereof; or

(4) Hospitalization or care facilities maintained by any university or college established under the laws of this State and supported principally by public funds raised by taxation.

(B) "Person" means the State, and any political subdivision or municipal corporation, individual, firm, partnership, corporation, company, association, or joint stock association, or the legal successor thereof.

(C) "Department" means the Department of Public Health of the State of Illinois.

(D) "Director" means the Director of the Department of Public Health of the State of Illinois.

§ 145. Necessity of permit powers of municipalities

No person shall establish a hospital without first obtaining a permit from the Department and no person shall open, conduct, operate, or maintain a hospital without first obtaining a license from the Department.

Nothing in this Act shall be construed to impair or abridge the power of municipalities to license and regulate hospitals, provided that the municipal ordinance substantially complies with the minimum standards and regulations developed by the Department pursuant to the provisions of this Act. Such compliance shall be determined by the Department subject to review as provided in Section 13 of this Act. Section 13 of this Act shall also be applicable to the judicial review of final administrative decisions of the regulatory agency of the municipality. Any municipality having an ordinance licensing and regulating hospitals which provides for minimum standards and regulations substantially in compliance with those developed pursuant to this Act shall make such periodic reports to the Department as the Department deems necessary. This report shall include a list of hospitals meeting standards substantially equivalent to those promulgated by the Department under this Act, and upon the receipt of such report the Department may then issue a license to such hospital.

§ 146. Application for permit and license

(a) An application for a permit to establish a hospital shall be made to the Department upon forms provided by it. This application shall contain such information as the Department reasonably requires, which shall include affirmative evidence on which the Director may make the findings required under Section 6a of this Act.

(b) An application for a license to open, conduct, operate, and maintain a hospital shall be made to the Department upon forms provided by it and shall contain such information as the

Department reasonably requires, which may include affirmative evidence of ability to comply with the provisions of this Act and the standards, rules, and regulations, promulgated by virtue thereof.

(c) All applications required under this Section shall be signed by the applicant and shall be verified. Applications on behalf of a corporation or association or a governmental unit or agency shall be made and verified by any two officers thereof.

§ 147. Issuance of permit and license—Provisional license

(a) Upon receipt of an application for a permit to establish a hospital the Director shall issue a permit if he finds (1) that the applicant is fit, willing, and able to provide a proper standard of hospital service for the community with particular regard to the qualification, background, and character of the applicant, (2) that the financial resources available to the applicant demonstrate an ability to construct, maintain, and operate a hospital in accordance with the standards, rules, and regulations adopted pursuant to this Act, and (3) that safeguards are provided which assure hospital operation and maintenance consistent with the public interest having particular regard to safe, adequate, and efficient hospital facilities and services.

The Director may request the cooperation of county and multiple-county health departments, municipal boards of health, and other governmental and non-governmental agencies in obtaining information and in conducting investigations relating to such applications.

A permit to establish a hospital shall be valid only for the premises and person named in the application for such permit and shall not be transferable or assignable.

In the event the Director issues a permit to establish a hospital the applicant shall thereafter submit plans and specifications to the Department in accordance with Section 8 of this Act.

(b) Upon receipt of an application for license to open, conduct, operate, and maintain a hospital, the Director shall issue a license if he finds the applicant and the hospital facilities comply with standards, rules, and regulations promulgated under this Act. A license, unless sooner suspended or revoked, shall be renewable annually upon approval by the Department. Each license shall be issued only for the premises and persons named in the application and shall not be transferable or assignable. Licenses shall be posted in a conspicuous place on the licensed premises. The Department may, either before or after the issuance of a license, request the cooperation of the Division of Fire Prevention of the Illinois Department of Law Enforcement, county and multiple county health departments, or municipal boards of health to make investigations to determine if the applicant or licensee is complying with the minimum standards prescribed by the Department. The report and recommendations of any such agency shall be in writing and shall state with particularity its findings with respect to compliance or noncompliance with such minimum standards, rules, and regulations.

The Director may issue a provisional license to any hospital which does not substantially comply with the provisions of this Act and the standards, rules, and regulations promulgated by virtue thereof provided that he finds that such hospital has undertaken changes and corrections which upon completion will render the hospital in substantial compliance with the provisions of this Act, and the standards, rules, and regulations adopted hereunder, and provided that the health and safety of the patients of the hospital will be protected during the period for which such provisional license is issued. The Director shall advise the licensee of the conditions under which such provisional license is issued, including the manner in which the hospital facilities fail to comply with the provisions of the Act, standards, rules, and regulations, and the time within which the changes and corrections necessary for such

hospital facilities to substantially comply with this Act, and the standards, rules, and regulations of the Department relating thereto shall be completed.

§ 147.05. Regulations and standards—Facilities for mentally ill—Facilities for mentally retarded

The Department shall prescribe, by regulation, standards for facilities for the mentally ill and separate standards for facilities for the mentally retarded which shall apply to State institutions under the jurisdiction of the Department of Mental Health and Developmental Disabilities. In developing the standards, the Department shall consider the guidelines of the federal government in determining eligibility under Title XVIII and Title XIX of the Social Security Act. The Department shall develop the standards in cooperation with the Department of Mental Health and Developmental Disabilities and shall consult with the Director of Mental Health and Developmental Disabilities before adopting or amending the regulations. The Governor may, by executive order, prescribe procedures for the development or review of the standards, and may require periodic review of the regulations.

§ 147.1. Psychiatric programs—Development of standards of evaluation—Consultation with mental health and developmental disabilities department

In licensing any hospital which provides for the diagnosis, care or treatment for persons suffering from mental or emotional disorders or for mentally retarded persons, the Department shall consult with the Department of Mental Health and Developmental Disabilities in developing standards for and evaluating the psychiatric programs of such hospitals.

§ 147.2. Administrative Procedure Act—Application

The provisions of "The Illinois Administrative Procedure Act", approved September 22, 1975, are hereby expressly

adopted and shall apply to all administrative rules and procedures of the Department of Public Health under this Act, except that Section 5 of the Illinois Administrative Procedure Act relating to procedures for rule-making does not apply to the adoption of any rule required by federal law in connection with which the Department is precluded by law from exercising any discretion.

§ 148. Denial, suspension or revocation of permit or license

(a) The Director after notice and opportunity for hearing to the applicant or licensee may deny, suspend, or revoke a permit to establish a hospital or deny, suspend, or revoke a license to open, conduct, operate and maintain a hospital in any case in which he finds that there has been a substantial failure to comply with the provisions of this Act or the standards, rules, and regulations established by virtue thereof.

(b) Such notice shall be effected by registered mail or by personal service setting forth the particular reasons for the proposed action and fixing a date, not less than 15 days from the date of such mailing or service, at which time the applicant or licensee shall be given an opportunity for a hearing. Such hearing shall be conducted by the Director or by an employee of the Department designated in writing by the Director as Hearing Officer to conduct the hearing. On the basis of any such hearing, or upon default of the applicant or licensee, the Director shall make a determination specifying his findings and conclusions. In case of a denial to an applicant of a permit to establish a hospital, such determination shall specify the subsection of Section 6 under which the permit was denied and shall contain findings of fact forming the basis of such denial. A copy of such determination shall be sent by registered mail or served personally upon the applicant or licensee. The decision denying, suspending, or revoking a permit or a license shall become final 35 days after it is so mailed or served, unless the

applicant or licensee, within such 35 day period, petitions for review pursuant to Section 13.

(c) The procedure governing hearings authorized by this Section shall be in accordance with rules promulgated by the Department and approved by the Hospital Licensing Board. A full and complete record shall be kept of all proceedings, including the notice of hearing, complaint, and all other documents in the nature of pleadings, written motions filed in the proceedings, and the report and orders of the Director and Hearing Officer. All testimony shall be reported but need not be transcribed unless the decision is appealed pursuant to Section 13. A copy or copies of the transcript may be obtained by any interested party on payment of the cost of preparing such copy or copies.

(d) The Director or Hearing Officer shall upon his own motion, or on the written request of any party to the proceeding, issue subpoenas requiring the attendance and the giving of testimony by witnesses, and subpoenas duces tecum requiring the production of books, papers, records, or memoranda. All subpoenas and subpoenas duces tecum issued under the terms of this Act may be served by any person of full age. The fees of witnesses for attendance and travel shall be the same as the fees of witnesses before the Circuit Court of this State, such fees to be paid when the witness is excused from further attendance. When the witness is subpoenaed at the instance of the Director, or Hearing Officer, such fees shall be paid in the same manner as other expenses of the Department, and when the witness is subpoenaed at the instance of any other party to any such proceeding the Department may require that the cost of service of the subpoena or subpoena duces tecum and the fee of the witness be borne by the party at whose instance the witness is summoned. In such case, the Department in its discretion, may require a deposit to cover the cost of such service and witness fees. A subpoena or subpoena duces tecum issued as aforesaid shall be served in the same manner as a subpoena issued out of a court.

(e) Any Circuit Court of this State upon the application of the Director, or upon the application of any other party to the proceeding, may, in its discretion, compel the attendance of witnesses, the production of books, papers, records, or memoranda and the giving of testimony before the Director or Hearing Officer conducting an investigation or holding a hearing authorized by this Act, by an attachment for contempt, or otherwise, in the same manner as production of evidence may be compelled before the court.

(f) The Director or Hearing Officer, or any party in an investigation or hearing before the Department, may cause the depositions of witnesses within the State to be taken in the manner prescribed by law for like depositions in civil actions in courts of this State, and to that end compel the attendance of witnesses and the production of books, papers, records, or memoranda.

§ 149. Alteration, addition to or new facilities—Submission of plans and specifications

Before commencing construction of new facilities or specified types of alteration or additions to an existing hospital, architectural plans and specifications therefor shall be submitted by the licensee to the Department of review and approval. In the case of the establishment of a new hospital, the person to whom the Director has issued a permit shall submit architectural plans and specifications to the Department for review and approval. Final approval of the plans and specifications for compliance with design and construction standards shall be obtained from the Department before the alteration, addition, or new construction is begun.

§ 150. Inspections and investigations

The Department shall make or cause to be made such inspections and investigations as it deems necessary. Informa-

tion received by the Department through filed reports, inspection, or as otherwise authorized under this Act shall not be disclosed publicly in such manner as to identify individuals or hospitals, except in a proceeding involving the denial, suspension, or revocation of a permit to establish a hospital or a proceeding involving the denial, suspension, or revocation of a license to open, conduct, operate, and maintain a hospital, or in other circumstances as may be approved by the Hospital Licensing Board.

§ 150.1 Institutions of Department of Mental Health and Developmental Disabilities—Inspection—Reports

The Department shall regularly inspect each State institution under the jurisdiction of the Department of Mental Health and Developmental Disabilities to ascertain if the institution is complying with the regulations applicable to it. Such inspection shall be made at least annually, and special inspections may be made at the discretion of the Director. The results of every inspection shall be reported in writing to the Governor, to the Director of the Department, the General Assembly, and any permanent mental health committee, board or commission as may be established by the Governor or General Assembly.

§ 151. Hospital licensing board

(a) The Governor shall appoint a Hospital Licensing Board composed of 11 persons, including the Director of Mental Health and Developmental Disabilities, ex officio, which shall advise and consult with the Director in the administration of this Act. Four appointive members shall represent the general public and 2 of these shall be members of hospital governing boards; one appointive member shall be a registered professional nurse as defined in The Illinois Nursing Act, approved June 14, 1951, as now or hereafter amended, who is employed in a hospital; 3 appointive members shall be hospital

administrators actively engaged in the supervision or administration of hospitals; 2 appointive members shall be practicing physicians, licensed in Illinois to practice medicine in all of its branches. In making Board appointments, the Governor shall give consideration to recommendations made through the Director by professional organizations concerned with hospital administration for the hospital administrative and governing board appointments, registered professional nurse organizations for the registered professional nurse appointment, and professional medical organizations for the physician appointments.

(b) Each appointive member shall hold office for a term of 3 years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term and the terms of office of the members first taking office shall expire, as designated at the time of appointment, 2 at the end of the first year, 2 at the end of the second year, and 3 at the end of the third year, after the date of appointment. The initial terms of office of the 2 additional members representing the general public provided for in this Section shall expire at the end of the third year after the date of appointment. The term of office of each original appointee shall commence July 1, 1953; the term of office of the original registered professional nurse appointee shall commence July 1, 1969; and the term of office of each successor shall commence on July 1 of the year in which his predecessor's term expires. Board members, while serving on business of the Board, shall receive actual and necessary travel and subsistence expenses while so serving away from their places of residence. The Board shall meet as frequently as the Director deems necessary, but not less than once a year. Upon request of 5 or more members, the Director shall call a meeting of the Board.

(c) The Director shall prescribe rules, regulations, standards, and statements of policy needed to implement, interpret,

or make specific the provisions and purposes of this Act. No rule, regulation, or standard shall be adopted by the Department concerning the operation of hospitals licensed under this Act which has not had prior approval of the Hospital Licensing Board, nor shall the Department adopt any rule, regulation or standard relating to the establishment of a hospital without consultation with the Hospital Licensing Board.

§ 151.1. Applicants' internship or residency training program

In connection with any application for a license or a renewal thereof, the Department may request such information about the applicant's internship or residency training program as may be necessary to establish that the intern, resident, or physician is in compliance with the requirements of paragraph b of subsection 1 of Section 5 or Section 11a of the Medical Practice Act, in these respects.

§ 152. Placing children for adoption

No hospital, nor any person connected with any hospital, shall place children for adoption or for care in foster family homes, or shall place children anywhere other than in the custody of their mothers, unless the hospital shall also be licensed as a child welfare agency, pursuant to the "Child Care Act", approved July 10, 1957, as amended, or unless the written consent of the State Department of Children and Family Services be first had and obtained; provided, that any hospital may release children therefrom to a licensed child welfare agency.

§ 153. Reports

The Department shall prepare an annual report of its activities and operations under this Act.

§ 154. Review under Administrative Review Act

Whenever the Department refuses to grant, or revokes or suspends a permit to establish a hospital, or a license to open,

conduct, operate, or maintain a hospital, the applicant or licensee may have such decision judicially reviewed. The provisions of the "Administrative Review Act", approved May 8, 1945, as heretofore or hereafter amended, and the rules adopted pursuant thereto shall apply to and govern all proceedings for the judicial review of final administrative decisions of the Department hereunder. The term "administrative decisions" is defined as in Section 1 of the "Administrative Review Act".

§ 155. Establishing hospital without permit—Operation without license

Any person establishing a hospital without a permit issued pursuant to this Act, or any person opening, conducting, operating or maintaining any hospital without a license issued pursuant to this Act shall be guilty of a petty offense, and each day of a continuing violation after conviction shall be considered a separate offense. The State's Attorneys of the several counties shall represent the People of the State of Illinois in proceedings under this Act in their respective counties.

MEDICAL PRACTICE ACT

ILL. REV. STAT. CH. 91

§ 1. Title of Act

This Act shall be known as the Medical Practice Act.

§ 2. License as prerequisite to practice

No person shall practice medicine, or any of its branches, or midwifery, or any system or method of treating human ailments without the use of drugs or medicines and without operative surgery, without a valid, existing license so to do.

§ 2a. Emergency care of injured persons—Exemption from civil liability

Any person licensed pursuant to this Act or any person licensed to practice the treatment of human ailments in any other state or territory of the United States, except a person licensed to practice midwifery, who in good faith provides emergency care without fee at the scene of a motor vehicle accident or in case of nuclear attack shall not, as a result of his acts or omissions, except wilful or wanton misconduct on the part of such person, in providing such care, be liable for civil damages.

§ 3. Examination

No person, except as otherwise provided in this Act, shall hereafter receive such a license unless he shall pass an examination of his qualifications therefor by and satisfactorily to the Department of Registration and Education, hereinafter referred to as the Department.

§ 4. Applicant for examination—Duties—Qualifications—Examination fees

Each applicant for such examination shall:

1. Make application for examination on blank forms prepared and furnished by the Department;

2. Submit evidence under oath satisfactory to the Department that:

(a) He is 21 years of age or over;

(b) He is of good moral character;

(c) He has the preliminary and professional education required by this Act;

(d) He is a citizen of the United States or has made a declaration of intention to become a citizen or, having made such declaration of intention, has filed a petition for naturalization within 30 days after becoming eligible to do so or, if not

eligible for naturalization under the Federal Immigration and Nationality Act, who has taken and filed with the Department an oath that, while in the United States, he will remain loyal to the Constitution of the United States and not affiliate with any organization which advocates the overthrow of the government of the United States by force or violence. This loyalty oath shall expire after a period of 5 years and may not be renewed. Provided further, that any such non-citizen licensed hereunder, if eligible for naturalization, shall be obliged to perfect his United States citizenship. Should he fail to do so, the Department shall refuse to renew his license under Section 14 hereof until final citizenship shall have been attained.

3. Designate specifically the name, location, and kind of professional school, college, or institution of which he is a graduate and the system or method of treatment under which he seeks, and will undertake, to practice;

4. Pay to the department at the time of application fees as follows:

(a) For the examination to practice medicine in all of its branches and for an original license, $75;

(b) For the examination to treat human ailments without the use of drugs and medicines and without operative surgery, and for an original license, $75;

(c) For the examination to practice midwifery, and for an original license, $50; and the fee to be paid for a second and subsequent examination is $25;

(d) For such examination as may be required of applicants for a license under Section 13 of this Act, $150;

(e) The fee to be paid for re-examination for registration to practice medicine in all of its branches is $50.

The fee to be paid for re-examination for registration to practice medicine as a drugless practitioner is $50.

Notwithstanding the foregoing provisions of this Section, an applicant who meets all the foregoing requirements except

that set forth in subparagraph (d) of paragraph 2 shall be permitted to take the examination to practice medicine in all its branches and, upon successfully passing such examination, shall be entitled to a limited license authorizing such person to practice in a hospital emergency room under the supervision of the hospital staff. In such case, the fees shall be the same as those applicable for examination and license to practice medicine in all its branches.

§ 5. Minimum standards of professional education

Except as provided in Section 9a of this Act, the minimum standards of professional education to be enforced by the department in conducting examinations and issuing licenses shall be as follows:

1. Practice of Medicine. For the practice of medicine in all of its branches:

(a) For an applicant who is a graduate of a medical college before the passage of this Act, that such medical college at the time of his graduation required as a prerequisite to graduation a 4 years' course of instruction of not less than 9 months each, in such medical college, or its equivalent, the time elapsing between the beginning of the first year and the ending of the fourth year having been not less than 40 months, and which was reputable and in good standing in the judgment of the department; and prior to taking such examination said applicant must present proof that he has completed a 4 years' course of instruction in a high school or its equivalent as determined by an examination conducted by the department.

(b) For an applicant who is a graduate of a medical college after the passage of this Act, that such medical college at the time of his graduation required as a prerequisite to admission thereto a 2 years' course of instruction in a college of liberal arts, or its equivalent, or in such medical college, and a course of instruction in a medical college in the treatment of human ailments, which course shall have been not less than 132

weeks in duration and shall have been completed within a period of not less than 35 months, and in addition thereto, a course of clinical training of not less than 12 months in a hospital, such college of liberal arts, medical college and hospital having been reputable and in good standing in the judgment of the department.

2. Treating human ailments without drugs or medicines and without operative surgery. For the practice of any system or method of treating human ailments without the use of drugs or medicines and without operative surgery:

(a) For an applicant who was a resident student and who is a graduate before July 1, 1926, of a professional school, college or institution which taught the system or method of treating human ailments, which he specifically designated in his application as the one he would undertake to practice, that such school, college or institution at the time of his graduation required as a prerequisite to graduation a 3 years' course of instruction of not less than 6 months each, the time elapsing between the beginning of the first year and the ending of the third year having been not less than 22 months, and which are reputable and in good standing in the judgment of the department and prior to taking the examination the applicant must present proof that he has completed a 4 years' course of instruction in high school, or its equivalent, as determined by an examination conducted by the department.

(b) For an applicant who was a resident student and who is a graduate after July 1, 1926, of a professional school, college or institution which taught the system or method of treating human ailments which he specifically designated in his application as the one which he would undertake to practice, that such school, college or institution at the time of his graduation required as a prerequisite to admission thereto a 4 years' course of instruction in a high school, and as a prerequisite to graduation therefrom a course of instruction in the treatment of

human ailments, of not less than 132 weeks in duration and shall have been completed within a period of not less than 35 months except that as to students matriculating or entering upon a course of study of any system or method of treating human ailments without the use of drugs or medicines and without operative surgery during the years 1940, 1941, 1942, 1943, 1944, 1945, 1946, and 1947, the said elapsed time shall be not less than 32 months, such high school and such school, college or institution having been reputable and in good standing in the judgment of the department.

(c) For an applicant who is a matriculant in a chiropractic college after September 1, 1969, that such applicant shall be required as a prerequisite for admission to examination for licensure, to complete a 2 years' course of instruction in a liberal arts college or its equivalent, and a course of instruction in a chiropractic college in the treatment of human ailments, such course as a prerequisite to graduation therefrom having been not less than 132 weeks in duration and shall have been completed within a period of not less than 35 months, such college of liberal arts and chiropractic college having been reputable and in good standing in the judgment of the Department.

3. Midwifery. For the practice of midwifery: That he be a graduate of a college of midwifery which requires as a prerequisite to admission thereto, a one year's course of instruction in a high school or its equivalent, and required as a prerequisite to graduation, a one year's course in such college of midwifery, the time actually spent under instruction in such college of midwifery to have been not less than 12 months; such high school or equivalent school, and such college of midwifery having been in good standing in the judgment of the department.

Without prejudice to licenses heretofore issued under this section, no further licenses shall be issued under this section after the effective date of this amendment.

§ 6. Evidence of preliminary education

The course of instruction in high schools, or other schools, and colleges of liberal arts required by any medical college or professional school, college or institution, or required under any of the provisions of this Act, shall have been such as shall be satisfactory to the department, and shall be evidenced with respect to any application in the manner required by the department.

§ 7. Examinations—Rules and regulations

All examinations provided for by this Act shall be conducted under rules and regulations prescribed from time to time by the department. Examinations shall be held not less frequently than four times every year, at times and places prescribed by the department, of which applicants shall be notified by the department in writing, and may be conducted wholly or in part in writing.

§ 8. Examination for general practice

Examination of applicants who seek to practice medicine in all of its branches shall embrace the subjects of which knowledge is generally required of candidates for the degree of doctor of medicine by reputable medical colleges in the United States, and shall be such in the judgment of the department as will determine the qualifications of applicants to practice medicine in all of its branches.

§ 9. Examination for practice without medicine, drugs or operative surgery

Examinations of applicants who seek to practice any system or method of treating human ailments without the use of drugs or medicines and without operative surgery shall be the same as required of applicants who seek to practice medicine in all of its branches, excepting therefrom materia medica, therapeutics, surgery, obstetrics, and theory and practice, and

shall be such in the judgment of the department as will determine the qualifications of the applicant to practice the particular system or method of treating human ailments without the use of drugs or medicines and without operative surgery which he specifically designated in his application as the one which he would undertake to practice. If the applicant is a graduate of a professional school, college or institution in which obstetrics was taught to him as well in the judgment of the department as such subject was taught at the same time in medical colleges in the United States reputable and in good standing in the judgment of the department, he may upon his request be examined in obstetrics.

§ 9a. Waiver of minimum standards of professional education for chiropractors—Conditions

The requirements of Section 5 of this Act, insofar as they relate to the minimum standards of professional education to be enforced by the department in conducting examinations and issuing licenses to persons who specifically designate in their application that they would undertake to practice chiropractic, shall be waived by the department under the following terms and conditions:

(a) Any applicant who was a graduate of a professional school, college or institution which taught chiropractic as a system or method of treating human ailments and which required as a prerequisite to graduation a 3 years' course of instruction of not less than 6 months each, and having received a healing arts degree of doctor of chiropractic, D. C., shall be permitted until October 31, 1962 to take the regular examination for the treatment of human ailments without the use of drugs or medicine and without operative surgery given for a chiropractic license, which examination shall include the basic science, diagnostic, and chiropractic therapy subjects as given by the Department of Registration and Education in accordance with the usual regulations pertaining to such examinations,

if such person for at least one year immediately prior to July 1, 1959, has been a resident of the State of Illinois. If the applicant fails to obtain a passing average grade in all subjects upon which he is examined prior to October 31, 1962, then before admission to any subsequent examination is given the applicant must demonstrate to the satisfaction of the Department of Registration and Education evidence of registration for, and satisfactory completion of a course of not less than 240 hours in a school of chiropractic which is recognized by the Department of Registration and Education. The additional educational requirement and successful completion of the examination given by the Department of Registration and Education must be completed on or before January 31, 1967. Failure to obtain a passing average grade on or before January 31, 1967 disqualifies an applicant for admission to further examinations until such time as he has satisfied all of the eligibility requirements as specified in Paragraph (b) of Sub-Section 2 of Section 5 of this Act.

(b) Any applicant who was a graduate of a professional school, college or institution which taught chiropractic as a system or method of treating human ailments and which required as a prerequisite to graduation therefrom a four years' course of instruction of not less than eight months each and having received a healing arts degree of doctor of chiropractic, D. C., the time elapsing between the beginning of the first year and the ending of the fourth year having been not less than thirty-six months, which professional school, college or institution was not recognized, before September 1, 1957, by the Department of Registration and Education, shall be permitted until October 31, 1962, to take the regular examination for the treatment of human ailments without the use of drugs or medicine and without operative surgery given for a chiropractic license, which examination shall include the basic science, diagnostic and chiropractic therapy subjects as given by the Department of Registration and Education in accordance with the usual regulations pertaining to such examination, if such

person for at least one year immediately prior to July 1, 1959, has been a resident of the State of Illinois. If the applicant fails to obtain a passing average grade in all subjects upon which he is examined prior to October 31, 1962, then before admission to any subsequent examination is given, the applicant must demonstrate to the satisfaction of the Department of Registration and Education, evidence of registration for and satisfactory completion while in residence, of a course of not less than 240 hours in a school of chiropractic which is recognized by the Department of Registration and Education. This additional requirement and successful completion of the examination given by the Department of Registration and Education must be completed on or before January 31, 1967. Failure to obtain a passing average grade on or before January 31, 1967, disqualifies an applicant for admission to further examination until he has presented satisfactory evidence of further study to the Department of Registration and Education.

(c) To be eligible for the benefits of this section a person must have registered notice of intent with the Department of Registration and Education on or before October 31, 1959, and submit proof that he has been a resident of the State of Illinois for at least one year immediately prior to July 1, 1959, and certify that he desires to avail himself of the provisions of this Act. Such person shall after October 31, 1962, report to the Department of Registration and Education annually thereafter until he passes the examination, or until January 31, 1967, whichever first occurs, that he is pursuing a course of study leading to qualifications to take the examination given by the Department of Registration and Education for a license as a chiropractor.

Any such applicant shall not be subject to prosecution for failure to have a license under the provisions of the Medical Practice Act during the period covered by this Section, provided that nothing herein shall be deemed to affect any suit pending in any Court on July 1, 1959.

§ 10. Examination for midwifery

Examination of applicants who seek to practice midwifery shall be such in the judgment of the department as will determine the qualifications of applicants to practice midwifery.

§ 10.1 Ineligibility for examination

Any person who shall fail any examination under this Act a total of 5 times shall thereafter be ineligible for further examinations until such time as such person shall submit to the Department evidence of further formal professional study in an accredited institution.

§ 11. Kinds of licenses

Every applicant successfully passing his examinations shall be entitled to an appropriate license. The following kinds of licenses shall be issued:

1. To practice medicine in all of its branches, to fully qualified applicants passing examinations therefor;

2. To treat human ailments without the use of drugs or medicines and without operative surgery, to applicants passing examinations therefor, the applicant under such a license to be specifically restricted by the terms thereof to the practice of the system or method which he specifically designated in his application as the one which he would undertake to practice, but such of these applicants as shall have successfully passed the examination in obstetrics under the requirements of Section 9 of this Act shall also be specifically licensed in the same instrument to practice obstetrics.

3. To practice midwifery.

4. To practice medicine in a hospital emergency room under the supervision of the hospital staff, to applicants meeting all the requirements for a license to practice medicine in all its branches except the requirement set forth in subparagraph (d) of paragraph 2 of Section 1 of this Act.

MENTAL HEALTH CODE

ILL. REV. STAT. CH. 91½ § 1—1 *et seq.*

§ 1—5. Licensed private hospital

"Licensed Private Hospital", when used in this Act, means any privately-owned home, hospital, or institution licensed by the Department of Public Health for the care, treatment, detention and training of persons who are mentally retarded or in need of mental treatment.

§ 1—11. Physician

"Physician", when used in this Act, means any person licensed by the State of Illinois to practice Medicine in all its branches, and shall include any person holding a State Hospital Permit or Temporary Certificate of Registration, as provided in the Medical Practice Act.

§ 1—12. Psychologist

"Psychologist," when used in this Act, means any person who is certified as a psychologist under the "Psychologist Registration Act".

THE CIVIL ADMINISTRATIVE CODE

ILL. REV. STAT. CH. 127, § 1 *et seq.*

THE DEPARTMENT OF PUBLIC HEALTH

§ 55. Powers and duties of Department of Public Health

The Department of Public Health has the powers enumerated in Sections 55.01 to 55.35 each inclusive.

§ 55.26 Hospital construction and health service programs—Participation in benefits of federal law

To conduct State-wide inventories of existing hospitals, health service facilities and personnel for hospital and medical

care and a survey of need of hospitals, health service facilities and personnel, to adopt State plans, based upon such inventories and surveys, embracing a hospital construction program and a health service program for hospital and medical care; and to make reports in such form and containing such information as the Surgeon General of the United States Public Health Service may from time to time reasonably require; and to do all other things on behalf of the State as may be necessary in order for the State to participate in the benefits of the "Hospital Survey and Construction Act," enacted by the 79th Congress and any other Act enacted by Congress pertaining to hospital and medical care and health services. The Department of Public Health is designated as the sole State agency for the administration of such State plans and as the agency for receiving payments to the State from the United States of America in accordance with the provisions of such Acts of Congress.

Social Security Act of 1935, as amended
Subchapter XVIII—Health Insurance
for Aged and Disabled
42 U. S. C. § 1395 *et seq.*

Part C—Miscellaneous Provisions

§ 1395x. Definitions

For the purposes of this subchapter—

* * *

Psychiatric Hospital

(f) The term "psychiatric hospital" means an institution which—

(1) is primarily engaged in providing, by or under the supervision of a physician, psychiatric services for the diagnosis and treatment of mentally ill persons;

(2) satisfies the requirements of paragraphs (3) through (9) of subsection (e) of this section;

(3) maintains clinical records on all patients and maintains such records as the Secretary finds to be necessary to determine the degree and intensity of the treatment provided to individuals entitled to hospital insurance benefits under part A;

(4) meets such staffing requirements as the Secretary finds necessary for the institution to carry out an active program of treatment for individuals who are furnished services in the institution; and

(5) is accredited by the Joint Commission on Accreditation of Hospitals.

In the case of an institution which satisfies paragraphs (1) and (2) of the preceding sentence and which contains a distinct part which also satisfies paragraphs (3) and (4) of such sentence, such distinct part shall be considered to be a "psychiatric hospital" if the institution is accredited by the Joint Commission on Accreditation of Hospitals or if such distinct part meets requirements equivalent to such accreditation requirements as determined by the Secretary.

§ 1395bb. Effect of accreditation

(a) Except as provided in subsection (b) of this section and the second sentence of section 1395z of this title, if—

(1) an institution is accredited as a hospital by the Joint Commission on Accreditation of Hospitals, and

(2) such institution (if it is included within a survey described in section 1395aa(c) of this title) authorizes the Commission to release to the Secretary (on a confidential basis) upon his request (or such State agency as the Secretary may designate) a copy of the most current accreditation survey of such institution made by such Commission,

then, such institution shall be deemed to meet the requirements of the numbered paragraphs of section 1935x(e) of this title; except—

(3) paragraph (6) thereof, and

(4) any standard, promulgated by the Secretary pursuant to paragraph (9) thereof, which is higher than the requirements prescribed for accreditation by such Commission.

If such Commission, as a condition for accreditation of a hospital, requires a utilization review plan (or imposes another requirement which serves substantially the same purpose) or imposes a standard which the Secretary determines is at least equivalent to the standard promulgated by the Secretary as described in paragraph (4) of this subsection, the Secretary is authorized to find that all institutions so accredited by such Commission comply also with section 1395x(e)(6) of this title or the standard described in such paragraph (4), as the case may be. In addition, if the Secretary finds that accreditation of an institution or agency by the American Osteopathic Association or any other national accreditation body provides reasonable assurance that any or all of the conditions of section 1395x(e), (j), or (*o*) of this title, as the case may be, are met, he may, to the extent he deems it appropriate, treat such institution or agency as meeting the condition or conditions with respect to which he made such finding.

(b) Notwithstanding any other provision of this subchapter, if the Secretary finds following a survey made pursuant to section 1395aa(c) of this title that an institution has significant deficiencies (as defined in regulations pertaining to health and safety), such institution shall, after the date of notice of such finding to the hospital and for such period as may be prescribed in regulations, be deemed not to meet the requirements of the numbered paragraphs of section 1395x(e) of this title.

APPENDIX D

JOINT COMMISSION
on Accreditation of Hospitals
Accreditation Council for Psychiatric Facilities
875 North Michigan Avenue
Chicago, Illinois 60611
(312) 642-6061

June 20, 1978

Mrs. Christine Grothouse,
Administrator
Barclay Hospital
4700 North Clarendon Avenue
Chicago, Illinois 60640

Survey Team: Weaver O. Howard, M.D.

Survey Date: July 14, 1978

Dear Mrs. Grothouse:

The Field Representatives named above will visit your facility/program to conduct the survey for the Joint Commission on Accreditation of Hospitals, Accreditation Council for Psychiatric Facilities.

As you know, the accreditation survey provides an opportunity for consultation and education for your staff, as well as an evaluation of your facility/program accreditation status. Therefore, participation in the survey by the administrative and clinical staff and members of the governing body is encouraged.

Council Members
American Academy of Child Psychiatry
American Association on Mental Deficiency
American Association of Psychiatric Services for Children
American Hospital Association
American Psychiatric Association
Association of Mental Health Administrators
National Association of Private Psychiatric Hospitals
National Association of State Mental Health Program Directors
National Coalition for Alcoholism Program Accreditation
National Council of Community Mental Health Centers

R. Exh. 107h

During the actual survey process, times of touring various areas should remain flexible, as it is difficult frequently for the surveyors to predict exactly how much time will be needed in each area.

At the conclusion of the survey, a summation conference will be held at which time the surveyors will present their findings. This is an important opportunity for the facility/program to discuss and clarify comments and recommendations made by surveyors. A written report will be sent by the field representatives to the Joint Commission where it will be analyzed carefully and thoroughly before being submitted to the AC/PF Accreditation Committee and the Board of Commissioners for radification of an accreditation decision.

You will receive the recommendations and comments resulting from your survey and a formal decision approximately three months after the visit.

Sincerely,

MYRENE MCANINCH, Ph.D.
Myrene McAninch, Ph.D.
Associate Director
Accreditation Programs

MM:cj
encls.

cc: Chairman of Governing Body
Chief of Medical/Clinical Staff

ACCREDITATION COUNCIL FOR PSYCHIATRIC FACILITIES

THE ON-SITE SURVEY VISIT

Your survey will begin with a meeting between the surveyor and the chief administrative officer, or his designate. Please refer to the list of items to have available for the surveyor at the time of the on-site visit. Other members of the facility staff, selected by the chief administrative officer, may be present at this meeting. The surveyor will acquaint those present with a brief overview of what is going to take place. The chief administrative officer will be expected to give the surveyor any necessary information that will help orient him to the operations of the facility.

Following this meeting the surveyor may request an interview with the head of the Medical/Clinical Records Department. The purpose of this meeting will be to select a sample of clinical records for review at the time designated by the surveyor.

All documents prepared in advance for the surveyor (written plan for clinical services, By-laws, staff organization plans, etc.) will be reviewed at some time during the survey process. The chief administrative officer and other personnel familiar with or responsible for the items listed should be available at this time to clarify any questions that may arise. The surveyor may review all such documents in one particular location, or he/she may want to review them in the locale of the service being provided; hence if duplicate items are not available at this location the surveyor should be so advised at the beginning of the survey process.

The surveyor will work out with the chief administrative officer a tentative schedule for the balance of the survey. The times given will be approximate since the surveyor will take time to answer any and all questions that your staff may have during the survey.

The following elements of the survey may not take place in the sequence listed but will be included in your survey:

Information Interview. This may be part of your survey. At the time you receive notice of your survey schedule, JCAH recommends that this information be posted in a public place to afford opportunity for interested and informed citizens to participate in the survey process. Staff having information relevant to the facility's adherence to JCAH standards may also request participation. This interview is directed only to those issues related to JCAH-AC/PF standards and should not be construed as a hearing. The information interview, however, is a useful tool in providing your agency staff and our surveyor(s) valuable information as to the community/consumer's perception of the quality of care rendered by your agency in light of our standards.

Review of Clinical Records. The surveyor will review the records selected. The head of the clinical records department should be available to assist in this process.

Clinical Records Workshop. The surveyor will specify a definite time for this educational portion of the survey. In addition to the chief administrative officer and clinical director, it is recommended that as many clinical personnel as possible, especially all department/service and/or team/unit leaders, participate in this portion of the survey. There will be an open discussion about what constitutes a good clinical record, and how it can be used most effectively in the treatment of patients.

Meeting with Department/Service/Program Heads. The surveyor may request a meeting with various department/service/program heads. He may ask to speak with them singly, as a group, or may interview them in connection with his review of departments, services or programs.

Review of Departments, Services, or Programs. The surveyor will indicate the departments, services or programs to be reviewed under the appropriate standards. There will not be a

duplication of review by other team members, if this is a multiple category facility.

Patient Follow-through. The surveyor may select a series of patients and will ask to speak to the clinical staff involved in their treatment. A staff conference may serve this purpose. In some instances, direct interview with patients may be requested.

Tour of Facility. The surveyor will tour various sections of the facility, including all buildings or areas where patients are housed or receive care and treatment. This will include both on-campus and off-campus locations. No outsiders, observers, press, interested citizens, etc., are allowed to follow the survey process unless approved by the Chief Administrative Officer and subject to the surveyor's approval. If at all possible, the Joint Commission should be notified at least four weeks in advance of requests for such.

Summation Conference. On the last day of your survey, the surveyor(s) will summarize his/their impressions and recommendations. It is recommended that at least one member of the governing body, the chief administrative officer, the clinical director, and department/service/program heads be available for this portion of the survey. In addition, the facility is encouraged to have as many other personnel as possible attend the conference. The facility staff will be encouraged to discuss the impressions and recommendations presented and rebuttals, if appropriate.

ON-SITE VISIT-DOCUMENTATION

To assist the surveyor during the on-site visit to your facility/program, please have the following additional items available for surveyor review at that time.

1. The current by-laws, rules and regulations of the governing body, a list of the governing body members, listed by name and title; a copy of the minutes of the governing body for the past 12 months.

2. The job description for the position of Director/Unit Chief and all coordinators of clinical service components, e.g., Director Outpatient services.

3. Policies and Procedures manuals specific to a given service/unit, and minutes of department/service or team /unit meetings for the last 12 months.

4. The facilities/programs fiscal year budget, auditor's report, most recent financial statement, the procedure used for accumulating and reporting revenues and expenses, and cost analysis of services rendered, if available.

5. Contractual agreements between your facility/program and any consulting professionals or agencies that assume responsibility for some portion of care and treatment of your patients; written referral policies.

6. Applications of all individuals granted clinical privileges and current copies or proof of licensure/registration for all physicians, dentists and all other professional staff for whom licensure/registration is required by the state.

7. The most recent report(s) of safety inspection by agency personnel as well as safety inspections conducted by outside agencies regarding boilers, sprinklers, elevators, etc.

8. Most recent insurance underwriter's report and schedule of insurance coverage from the facility's insurance company, where applicable.

9. Internal and external disaster plans and critiques of the disaster drills performed in the last 12 months, except for alcoholism programs where external drills are not required.

10. A copy of the minutes and/or records of the in-service training program(s) for the last 12 months.

11. Minutes of the medical staff meetings for the last 12 months, where applicable.

12. Minutes of the Committee meetings of the medical staff for the last 12 months, where applicable.

13. The annual and monthly statistical reports pertaining to direct and indirect services of the facility and its programs/departments for the past year, if available.

14. Master staffing patterns and current staffing schedules from all services.

15. Patient information brochures, if any, and information relating to patients' rights.

16. Personnel policy manual and job descriptions for all categories of personnel.

JOINT COMMISSION
on Accreditation of Hospitals
875 North Michigan Avenue
Chicago, Illinois 60611

American College of Physicians
American College of Surgeons
American Hospital Association
American Medical Association

Director/John D. Porterfield, M.D.

POLICY & PROCEDURE ON INFORMATION INTERVIEWS WITH PUBLIC REPRESENTATIVES DURING FACILITY ACCREDITATION SURVEY

(Amended by the Board of Commissioners, April 26, 1975)

The facility must also provide certification or documentation of compliance with certain standards. In submitting its application for an accreditation survey, the facility authorizes the Joint Commission to obtain, or it shall provide, as required, official records and reports of public or publicly recognized licensing, examining, reviewing, or planning bodies. All pertinent information received from these sources is considered in the accreditation survey process. In addition, the Joint Commission will provide an opportunity during the on-site survey for the presentation of information by representatives of consumers and the public. Anyone believing he has pertinent and valid information about a facility's conformance to accreditation standards may request an interview for the presentation of this information.

Each facility to be surveyed is notified four to six weeks prior to the survey of the date(s) on which the survey will be conducted, and of the name(s) of the surveyor(s) who will conduct it. The facility is expected to post notice in a public place on the premises announcing the date of survey and stating that there is an opportunity for a public information interview.

Such public notice must be posted four weeks prior to the survey date, with an indication that requests for an information interview must be received by the Joint Commission two weeks prior to the survey. The facility is not required to publish information concerning the survey through the mass media. However, the facility is expected to share this survey information with anyone upon request and to preserve any letters requesting a public information interview.

A request from consumer or public representatives for an interview must be made in writing, and it must be received by the Joint Commission at least two weeks prior to the actual initiation of the on-site survey. The facility is expected to refer any such requests it receives to the Joint Commission. The Joint Commission will acknowledge each request, and will send a copy of this acknowledgement to the facility. The facility shall be responsible for notifying the interviewee of the exact date, time, and place of the interview.

Information interviews are usually conducted during the morning of the first survey day, and normally do not exceed two hours in length. However, the time and length of the interview should be mutually agreeable to all parties concerned. The facility will be expected to provide reasonable accommodation. One surveyor will chair the interview session and receive the information. In cases in which there is more than one surveyor, all members of the survey team need not be present, but facility representatives will be expected to attend.

The interview will consist only of the orderly receipt of information offered, verbally or in writing, within the prescribed time limit. All information received by this method will be fully considered for pertinence and verification, as is that from other sources, and the findings included in the survey report. Further rights of participation in the survey inure to any outside source of information only when granted by the facility.

All information obtained by the Joint Commission in the accreditation survey process, including the public information interview, and the content of the survey report are considered to be confidential matters between the Joint Commission and the surveyed facility. The survey report will be provided only to the surveyed facility.

Nothing in the above policy will preclude the right of the Joint Commission to make an interim unscheduled survey of any accredited facility for due cause.

JOINT COMMISSION ON ACCREDITATION
OF HOSPITALS

JOINT COMMISSION
on Accreditation of Hospitals
Accreditation Council for Psychiatric Facilities
875 North Michigan Avenue
Chicago, Illinois 60611
(312) 642-6061

John E. Affeldt, M.D.
President

Myrene McAninch, Ph.D.
Director, Accreditation Program

August 10, 1178

Christine Grothouse
Administrator
Barclay Hospital
4700 N. Clarendon Avenue
Chicago, IL 60640

Dear Ms. Grothouse:

In response to your letter of July 19, 1978, the purpose of the one-day survey was to verify that the change of ownership of Barclay Hospital (formerly George J. London Memorial Hospital) has not had an effect upon your hospital's compliance with the accreditation standards of the Joint Commission.

Assuming that the one-day survey indicates that the change in ownership has not had an effect upon your hospital's

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Council Members
American Academy of Child Psychiatry
American Association on Mental Deficiency
American Association of Psychiatric Services for Children
American Hospital Association
American Psychiatric Association
Association of Mental Health Administrators
National Association of Private Psychiatric Hospitals
National Association of State Mental Health Program Directors
National Coalition for Alcoholism Program Accreditation
National Council of Community Mental Health Centers

compliance with the accreditation standards, the previous two years accreditation will be extended to Barclay Hospital.

We trust the foregoing is responsive to your letter.

Sincerely,

JAMES O. CRARY
James O. Crary, M.S.
Accreditation Specialist
Adult Psychiatric and
Child/Adolescent
Programs

MYRENE MCANINCH, Ph.D.
Myrene McAninch, Ph.D.
Director

JOC/MM:ada

ADULT PROGRAMS

BARCLAY HOSPITAL
CHICAGO, ILLINOIS

DATE OF SURVEY	SURVEYOR	REVIEWERS
July 14, 1978	Weaver O. Howard, M.D.	Ethel Bennett
		James O. Crary, M.D.

RECOMMENDATIONS AND COMMENTS

AT THE TIME OF THIS SURVEY, SUBSTANTIAL COMPLIANCE WITH THE STANDARDS IN THE ACCREDITATION MANUAL FOR ADULT PROGRAMS WAS NOTED IN THE FOLLOWING AREAS, IN THAT SERVICES ARE ACTUALLY ORGANIZED OR THE NECESSARY ARRANGEMENTS OR PLANS FOR THE PROVISION OF SUCH SERVICES ARE ADEQUATE TO MEET THE NEEDS OF THE PATIENTS. SPECIFIC PROBLEM AREAS ARE AS FOLLOWS:

GOVERNING BODY/MEDICAL STAFF

1. The medical staff bylaws shall delineate the clinical privileges and qualifications of the medical staff for administering diagnostic or therapeutic hazardous procedures.

STAFF COMPOSITION

1. The governing body, through the chief administrative officer, shall provide appropriate personnel required to meet the needs of patients. Specific reference is made to the need for additional qualified activity services staff.

2. There shall be a written plan describing the organization of each service or the arrangement for the provision of such services, to meet the needs of patients. Specific reference is made to vocational rehabilitation services.

Opposition

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CLERK

No. 81-301

In the Supreme Court of the United States

OCTOBER TERM, 1981

ILLINOIS HEALTH SERVICE, INC., d/b/a
BARCLAY HOSPITAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner was a successor-employer thus obligated to recognize and bargain with the union certified as the representative of petitioner's non-professional employees.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-7a) is unreported. The decision and order of the National Labor Relations Board (Pet. App. 8a-35a) are reported at 247 N.L.R.B. No. 144.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1981. The petition for a writ of certiorari was filed on August 5, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 36a-37a.

STATEMENT

1. In a Board-conducted election, the non-professional employees of the George J. London Memorial Hospital, a non-profit psychiatric facility, voted 29 to 21 in favor of representation by the Warehouse, Mail Order, Office, Technical and Professional Employees, Local 743, International Brotherhood of Teamsters (Pet. App. 14a-15a & n.9). London's objections to the election were overruled by the Board's Regional Director. On June 9, 1978, the Board upheld the action of the Regional Director and certified the Union as the unit employees' bargaining representative. *George J. London Memorial Hospital*, 236 N.L.R.B. 797 (1978).

On January 6, 1978, while London's objections to the election were pending, Charter Medical Corporation executed an agreement to purchase London.[1] On March 24, Charter took over operation of Lon-

---

[1] The agreement contained a clause which provided (JX 13, at 6):

> 6. *Union Contract.* Seller [London] is in the process of contesting the election of Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the "Union"). In the event such election is not successfully contested prior to the closing, Seller may determine that it is in its best interests to negotiate a contract with the Union. The Union is also campaigning for election to represent the nurses employed by Seller and Seller is contesting the right of the Union to campaign to represent such employees. Seller agrees that it will regularly inform Purchaser [Charter] of the status of such contests and that Purchaser or its representatives may attend any negotiations which may eventually take place between Seller and the Union. Purchaser agrees that, from

don and shortly thereafter renamed the hospital Barclay (Pet. App. 16a; RX 8). Barclay continued operating as a psychiatric hospital and continued treating London's patients (Pet. App. 16a-17a). Barclay adopted London's written philosophies, goals and objectives as its own, as well as London's personnel manual and staff rules and regulations. Barclay used the same equipment, supplies, and services that London had used (Tr. 164, 436).

Barclay retained all of London's employees, including the 52 employees in the bargaining unit for which the union certification was then pending, and did not hire any new employees (Pet. App. 17a). Barclay also retained London's supervisory personnel (Pet. App. 16a-17a). London's chief administrator, Christine Grothouse, became the administrator and president of Barclay (Pet. App. 16a). Barclay did not require the former London employees to submit job applications or to serve the 90-day probationary period required of new employees (Pet. App. 17a). Barclay paid the employees at the rate London had paid, provided them with the same holidays and benefits that they had received from London, and

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> and after the Closing Date, it will assume and perform all the obligations of Seller under any contract which Seller may hereafter enter into with the Union.

Charter also agreed that there would be no mass discharges or layoffs of London employees following the change in ownership of the hospital, except in the event of a labor strike, financial hardship, loss of license, or other unusual circumstances (Pet. App. 16a).

"JX" refers to exhibits jointly offered by the General Counsel and petitioner during the Board proceedings. "Tr." refers to the transcript of the hearing before the Administrative Law Judge. "GCX" and "RX" refer to the General Counsel's exhibits and petitioner's exhibits.

gave them full credit for vacation hours and sick leave earned during their employment by London (Pet. App. 17a; Tr. 63, 64-65). The schedule of work shifts remained the same (Pet. App. 19a).

Barclay made several physical improvements to the hospital. In September 1978, part of the hospital parking lot was replaced by an enclosed patio area for the patients. In October or November, Barclay installed metal attachments on the windows to prevent patients from escaping. Sometime later, the hospital lobby was redecorated (Pet. App. 19a-20a).

Barclay also made limited changes in the programs and services offered (Pet. App. 20a). Following execution of the purchase agreement between Charter and London, in January 1978, Charter officials began to discuss the possibility of offering additional psychiatric programs and services. Among the proposals considered were a children's unit, an alcoholic treatment unit, an adolescent unit, and a long term analytic treatment program (Pet. App. 20a).[2]

In August, Barclay opened its new adolescent treatment program on the hospital's third floor to treat patients from 13 to 19 years of age, and admitted its first patients on August 31 (Pet. App. 21a). Although London had treated adolescent patients, it did not have a separate program designed specifically for them (Tr. 172-173, 190-191).[3]

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[2] Plans for the alcoholic treatment program were abandoned when negotiations for the purchase of an additional facility proved unsuccessful (Pet. App. 21a).

[3] Between October 1978 and February 1, 1979, Barclay hired three teachers and a director to staff a schoolroom for patients in the adolescent program (Pet. App. 23a). Before then, tutors had been employed to give educational instruction to adolescent patients (Tr. 219).

In mid-July, Barclay's consultant, Dr. Schwartz, met with officials from Charter to discuss the possibility of setting up a psychoanalytic treatment program (Pet. App. 23a-24a). In December, Barclay decided to establish such a program (Pet. App. 24a). As of March 1, 1979, however, the program still had not been implemented (*ibid.*).[4]

2. After being certified by the Board, the Union, on July 29, 1978, requested Barclay to begin collective bargaining (Pet. App. 25a-26a). On July 29, 1978, the date Barclay received the bargaining request, the Union represented a majority of Barclay's employees (*ibid.*). On August 7, Barclay denied the Union's request, and refused to recognize and bargain with the Union (*ibid.*).[5]

The General Counsel charged that petitioner's refusal to bargain violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. 158(a)(5) and (1)). After a hearing, an administrative law judge found that neither the physical modifications of the facility nor the changes in the services and programs implemented by Barclay rendered it substantially different from London (Pet. App. 29a-30a). Accordingly, the administrative law judge concluded that Barclay was a successor-employer and, therefore, had violated Section 8(a)

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[4] In late August or early September 1978, Barclay had begun plans to implement a team approach in the treatment of patients (Pet. App. 25a). The team approach began with one patient on the fourth floor in December, and was scheduled to start on the second floor after March 1, 1979 (*ibid.*).

[5] As of July 29, 1978, there were 45 employees in the bargaining unit; 37 of them had worked for London (Pet. App. 18a).

(5) and (1) of the Act by refusing to recognize and bargain with the Union (Pet. App. 30a-31a). The Board adopted the decision of the administrative law judge (Pet. App. 9a).

3. The court of appeals found that the Board's finding that Barclay was a successor was supported by substantial evidence and enforced the Board's order (Pet. App. 3a-5a).[6] The court explained: "that Barclay contemplated minor changes in the structure of the psychiatric hospital to be implemented in the future does not change the fact that the facility continued to operate in essentially the same manner as it did prior to the purchase" (Pet. App. 5a).

ARGUMENT

In *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 277-281 (1972), this Court held that when, despite a change in ownership of an enterprise, "the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent," the predecessor's duty to bargain may be enforced against the successor employer. When, as in this case, there is a "change of ownership not affecting the essential nature of the enterprise, the successor employer must recognize the incumbent union and deal with it as the bargaining representative." *Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F.2d 1025, 1026-1027 (7th Cir. 1969).

Petitioner contends (Pet. 11-14) that, because of its status as a hospital, it was obliged to continue its predecessor's operations and thus delay implementing

[6] The court also affirmed the Board's disposition of London's objections to the conduct of the election (Pet. App. 6a-7a). No issue concerning the validity of the election is raised here.

changes in services and programs. Petitioner seems to assert that, if it had been able to make these changes prior to opening the hospital, the changes would have been sufficient to preclude a finding that it was a successor employer, and, therefore, that it should not be penalized because it was required to delay "structur[ing] [its] newly purchased business in a fashion which results in * * * nonsuccessorship * * * " (Pet. 10).

The Board considered the changes by petitioner even though they were not made immediately; the Board found, and the court of appeals agreed, that "neither the changes contemplated by [petitioner] * * * nor the changes eventually implemented rendered [petitioner's] operation substantially different from that of London Hospital" (Pet. App. 9a). As the court of appeals observed, "[m]aterial changes in the fundamental nature of the hospital were not implemented by Barclay" (Pet. App. 5a n.1). Petitioner does not challenge the substantiality of the evidence supporting these findings. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). In any event, the record amply supports the Board's finding that the planned and implemented changes in petitioner's operation—the adolescent unit, the psychoanalytic program, the team approach in the treatment of patients, and the physical changes in its building—did not significantly change the nature of the employing enterprise. See pages 3-5, *supra*.[7]

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[7] Petitioner's contention (Pet. 14) that it did not have a full complement of employees until October or November was also rejected by the Board and by the court of appeals, as not supported by the evidence. When petitioner took over London in March, it had 52 employees; on July 29, 45 employees; on October 31, 57 employees; and on December 31, 51 employees

Petitioner had to meet state licensing requirements to operate a hospital. It did not, however, have to (Pet. 15-16) "assure the State that upon takeover it would continue the same services as did London." See Ill. Rev. Stat. ch. 111½, § 147 (Pet. App. 41a-43a). Rather, as petitioner concedes (Pet. 16-17), it decided to maintain the hospital as an ongoing operation with the same employees and suppliers to facilitate licensing and accreditation. In these circumstances, it is particularly appropriate to preserve the employees' representation rights. For, "if it can be said that the employer is reaping the advantages of continuity, the employees' interest in some stability of representation during a period of volatility takes on added significance." *NLRB* v. *Band-Age, Inc.*, 534 F.2d 1, 4 (1st Cir.), cert. denied, 429 U.S. 921 (1976).

Finally, to the extent that petitioner argues (Pet. 10) that a successor employer is entitled to shut down its predecessor's operation and hire new employees for the purpose of avoiding bargaining obligations, that is a misstatement of the law. A putative successor cannot refuse to hire the former employees of the seller because of union considerations. *NLRB* v. *Burns International Security Services, Inc.*, *supra*, 406 U.S. at 280-281 n.5.[8]

(Pet. App. 18a-19a, 26a-30a; JX 14). Petitioner does not contest the finding that the Union represented a majority of the unit employees on July 29, when the bargaining request was received. Indeed, petitioner's contention that its new programs were not operational until October or November and that majority status should therefore be measured as of that date also rests on the assertion that its new programs materially changed the operation of the hospital.

[8] In this case it is particularly appropriate to require petitioner to recognize and bargain with the Union since petitioner was aware of the Union's pending certification, agreed not to lay off London's employees, and even agreed to assume

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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National Labor Relations Board

NOVEMBER 1981

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any contractual obligations between London and the Union. Petitioner's assertion that the principles described in *Burns* are somehow inapplicable to health care institutions is unpersuasive. Nothing in petitioner's particular circumstances renders those principles inapposite. The Board and the courts have long applied the same successorship analysis for health care facilities as for other employers. See, *e.g.*, *NLRB* v. *Dent*, 534 F.2d 844, 845-846 (9th Cir. 1976); *NLRB* v. *Wayne Convalescent Center, Inc.*, 465 F.2d 1039, 1041-1043 (6th Cir. 1972); *Alcoholism Services of Erie County, Inc.*, 236 N.L.R.B. 927, 929 (1978). There is nothing in the legislative history of the health care amendments of 1974 to suggest that Congress intended to preclude or modify application of the successorship analysis approved in *Burns*. Indeed, petitioner's contention that hospitals should be able to avoid the successorship bargaining obligation imposed on industrial employers is inconsistent with the congressional judgment in enacting the health care amendments that insuring organization rights to health care employees would diminish labor strife at health care institutions. See *NLRB* v. *Beth Israel Hospital*, 437 U.S. 483, 497-498 (1978).

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Opposition

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No. 81-301

In the

Supreme Court of the United States

OCTOBER TERM, 1981

ILLINOIS HEALTH SERVICE, INC.,
d/b/a BARCLAY HOSPITAL,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES UNION LOCAL NO. 743, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenor.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether a purchaser of a hospital's assets, including land, building, machinery, personal property and accounts, is a successor employer obligated to bargain in good faith where the purchaser hired more than a majority of the predecessor's employees and continued to operate the facility in essentially the same manner as the seller.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-301

ILLINOIS HEALTH SERVICE, INC.,
d/b/a BARCLAY HOSPITAL,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES UNION LOCAL NO. 743, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenor.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Intervenor, Warehouse, Mail Order, Office, Technical and Professional Employees, Union Local No. 743, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, requests this Court to deny the petition for writ of certiorari.

STATEMENT OF THE CASE

The Union filed a representation petition with the National Labor Relations Board requesting that an election be conducted among non-professional employees at London Hospital, a psychiatric facility. A majority of the employees voted for the union on November 30, 1977. While the hospital's objections to conduct allegedly affecting the results of the election were pending before the Labor Board, Charter Medical Corporation purchased the assets of London Hospital. The purchase occurred on January 6, 1978, and on March 4, 1978, Charter took over daily operations and shortly thereafter renamed the hospital Barclay. The Board certified the Union as the collective bargaining representative of the non-professional employees on June 9, 1978. The Union demanded that Barclay bargain with it on June 29, 1978. Since then, Barclay has refused to bargain.

The Labor Board found that Barclay Hospital purchased all of the assets of London, including the land, building, machinery, equipment, furniture, fixtures, inventory, records, accounts and certain contractual rights and assumed certain of London's liabilities and obligations. The Labor Board also found that at the time of purchase Barclay knew of the union's election victory and proceedings before the Board on the certification issue. Barclay continued operating the hospital as a mental health care facility and all of London's employees in the bargaining unit were hired by Barclay and credited with various benefits they acquired while employed at London.

At the time the Union requested bargaining, July 29, all but eight of the forty-five bargaining unit employees

who had been employed by London were still working for Barclay and continued working in the same job classifications and were performing essentially the same duties. The Court of Appeals found that Barclay continued to operate the hospital as a mental health facility in essentially the same manner as London had. Accordingly, the Labor Board order requiring collective bargaining was enforced.

REASONS FOR DENYING THE WRIT

1. Successorship Law Has Been Correctly Applied

The Court of Appeals has correctly applied this Court's decisions involving a successor's obligations to bargain in good faith. The Court noted that Barclay Hospital did not change the essential nature of the mental health facility it had purchased. Relying upon this Court's opinion in *NLRB* v. *Burns International Security Systems, Inc.*, 406 U.S. 272, 279 (1972), the Court noted a mere change of employers or of ownership does not terminate the successor-owner's duty to bargain with the union. The minor changes in operation of the facility contemplated by Barclay, according to the Court, do not diminish the fact that the facility continued to be operated in essentially the same manner as it was prior to the purchase.

Barclay was aware of the Union's certification proceedings pending before the Labor Board and hired more than a majority of the predecessor's employees. It was, therefore, not unreasonable for the Board to conclude that the union certified to represent all of the employees in the unit still represented a majority of the employees.

Therefore, the Court of Appeals has correctly interpreted the major successorship case of this Court. Accordingly, the petition does not raise an important issue of federal law which has not yet been decided.

2. Congress Did Not Intend The Board To Apply Different Successorship Principles in the Health Care Industry

A careful reading of the legislative history of the 1974 health care amendments reveals that Congress did not intend the Board or this Court to apply different principles regarding successorship. In *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 507 (1978), this Court rejected the petitioner's contention that Congress had intended, in enacting 1974 health care amendments, the Board to apply different principles regarding no solicitation and no distribution rules to hospitals because of their patient-care functions. Similarly, petitioner's contention in this case for special treatment must be rejected.

Petitioner relies upon *Beth Israel Hospital* and *NLRB* v. *Baptist Hospital, Inc.*, 442 U.S. 773 (1979). Both cases involve hospital no solicitation and no distribution rules. This Court agreed that the Board has a responsibility to accommodate a hospital's needs to assure the well-being of patients, but rejected the contention that Congress intended different rules to apply in the solicitation and distribution area. Obviously, this Court, as well as the Board, are concerned that solicitation and distribution in patient care areas might disrupt health care operations or disturb the patients. This does not mean that special or different rules are to apply in successorship issues or even distribution cases.

The congressional and court concern for non-disruptive hospital labor relations is satisfied by an orderly transition from one owner to another concerning the representation rights of employees. Requiring Barclay Hospital to bargain with this union does not in any way disturb

or disrupt patient well-being. In correctly applying the successorship rules, the Court of Appeals has furthered the congressional purpose of the 1974 health care amendments by reducing the possibility of disruption due to renewed organizational or recognitional activity on the part of the hospital's employees. The stability of labor relations in the health care field would be seriously undermined in the absence of the continuing duty on the part of a successor employer to bargain with the employees' majority representative.

Therefore, there is no compelling reason to grant the petition, because Congress has not created special successorship rules for health care institutions.

CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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